(20)

No. 01-1243-CFX Title: Borden Ranch Partnership and Angelo K. Tsakopoulos, Petitioners
v.
United States Army Corps of Engineers and Environmental Protection Agency

Docketed: February 27, 2002

Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Feb 22 2002	Petition for writ of certiorari filed. (Response due April 29, 2002)
	Mar 21 2002	Order extending time to file response to petition until April 29, 2002.
	Apr 26 2002	Brief amici curiae of California Farm Bureau Federation, et al. filed.
	Apr 29 2002	Brief of respondents U.S. Army Corps of Engineers and EPA in opposition filed.
	Apr 29 2002	Brief amicus curiae of National Association of Home Builders filed.
	Apr 29 2002	Brief amicus curiae of American Farm Bureau Federation filed.
	May 7 2002	Reply brief of petitioners Borden Ranch Partnership, et al. filed.
	May 14 2002	DISTRIBUTED for Conference of May 30, 2002
	Jun 3 2002	REDISTRIBUTED for Conference of June 6, 2002
	Jun 10 2002	Petition GRANTED. Justice Kennedy OUT. SET FOR ARGUMENT December 10, 2002.
		**********
	Jun 21 2002	Order extending time to petitioners' brief on the merits to and including August 26, 2002. Order extending time to file respondent's brief on the merits to and including October 25, 2002.
	Jun 21 2002	Motion of petitioners Borden Ranch, et al. to dispense with printing the joint appendix filed.
	Aug 21 2002	LODGING consisting of twenty copies of Regulatory Guidance Letter 86-01 Of U.S. Army Corp of Engineers submitted by counsel for the petitioners,
	Aug 23 2002	Brief amici curiae of California Farm Bureau Federation, et al. filed.
	Aug 26 2002	Motion of petitioners Borden Ranch, et al. to dispense with printing the joint appendix GRANTED. Justice Kennedy OUT.
	Aug 26 2002	Brief of petitioners Borden Ranch Partnership and Angelo Tsakopoulos filed.
	Aug 26 2002	Brief amici curiae of American Farm Bureau Federation, et al. filed.
	Aug 26 2002	Brief amici curiae of Alabama, et al. filed.
	Aug 26 2002	Brief amicus curiae of Save Our Shoreline filed.
	Aug 26 2002	Brief amicus curiae of American Forest & Paper Association filed.
	Aug 26 2002	Brief amicus curiae of National Stone, Sand and Gravel Association filed.
	Aug 26 2002	Brief amicus curiae of National Association of Home Builders

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No. 01-1243-CFX

Entry	Date	Proceedings and Orders
		filed.
	Oct 23 2002	Brief amicus curiae of Association of State Wetlands Managers filed.
	Oct 25 2002	Brief of respondents United States Army Corp. of Engineers and EPA filed.
	Oct 25 2002	Brief amici curiae of New Jersey, et al. filed.
	Oct 25 2002	Brief amici curiae of National Wildlife Federation, et al. filed.
	Oct 25 2002	Brief amici curiae of Joy Zedler, et al. filed.
	Nov 1 2002	Record filed.
	Nov 1 2002	CIRCULATED.
	Nov 25 2002	Record filed.
	Nov 26 2002	Reply brief of petitioners Borden Ranch, et al. filed.
	Dec 10 2002	ARGUED.
	Dec 16 2002	Adjudged to be AFFIRMED. The judgment is affirmed by an equally divided Court. Justice Kennedy took no part in the consideration or decision of this case. Opinion per curiam.

No. _____

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The issue presented by this case is whether a farmer needs a federal permit to plow his agriculturally-zoned ranchland to plant new crops. Section 404 of the Clean Water Act authorizes the Army Corps of Engineers to require permits only for those activities that "discharge" or "add" a "pollutant" from a "point source" into waters of the United States, and further expressly exempts "normal farming and ranching activities, such as plowing," which do not convert the body of water "into a use to which it was not previously subject." Petitioners acquired the Borden Ranch, an 8,400 acre property in California's Central Valley that is zoned for agricultural use, and sought to enhance portions of the land that previously had been used to grow forage crops for higher value vineyards and orchards. Petitioners did this by deep plowing to prepare the soil for these deep-rooted crops. The Army Corps asserted jurisdiction under Section 404 of the Clean Water Act over these plowing activities, claiming petitioners were discharging pollutants into seasonal wetlands. The Ninth Circuit upheld this assertion of federal jurisdiction, over Judge Gould's dissent and in conflict with the D.C. Circuit's *National Mining* decision.

The questions presented are:

1. Does a rancher's deep plowing to enhance the soil's agricultural viability "add" a "pollutant" to a wetland so as to constitute a regulated point-source "discharge" within the meaning of Section 404 of the Clean Water Act?

QUESTIONS PRESENTED – Continued

2. Is deep plowing of ranchland, which is used to grow forage crops and is farmable in its natural state, in order to plant crops with deeper root systems, statutorily exempt from regulation under Section 404 as a "normal farming activity" that does not bring a water of the United States "into a use to which it was not previously subject"?

3. Does the Clean Water Act's civil penalty section, authorizing penalties "not to exceed $25,000 per day for each violation," authorize assessing the maximum daily penalty for each time a plow crosses a jurisdictional drainage feature, without regard to the number of days when such activity occurred?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Borden Ranch Partnership and Angelo K. Tsakopoulos respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1-22) is reported at 261 F.3d 810. The district court's opinion on summary judgment (App., *infra*, 28-56) is unreported. Its decision after the counterclaim trial (App., *infra*, 67-121) is unofficially reported at 1999 WL 1797329. The district court's summary judgment opinion in a related action, *Angelo K. Tsakopoulos v. American Manufacturers Mutual Insurance Co., et al.* (U.S. Dist. Ct. E.D. Cal.), Civ. No. S-99-0853 GEB JFM (Hon. Garland E. Burrell, Jr.) (App., *infra*, 135-164) is unreported. The U.S. Army Corps of Engineers' ("Corps") December 12, 1996 Regulatory Guidance Letter setting forth the basis for its regulation of petitioners' deep plowing is set out at App., *infra*, 199-207.

JURISDICTION

The court of appeals' opinion was filed August 15, 2001. On November 28, 2001, the court of appeals issued its Order denying petitioners' petition for rehearing *en banc*. On December 18, 2001, the court of appeals issued its Order granting petitioners' motion to stay the mandate pending filing of this petition. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Clean Water Act, 33 U.S.C. Sections 1311(a), 1319(d), 1344(a), (f), 1362(6), (12), (14), and (16), are reproduced at App., *infra*, 209-213. The relevant regulations, 40 C.F.R. Section 232.4(4)(iii), 40

C.F.R. Section 232.3(c)(1)(i),(ii) and (d)(4), and 33 C.F.R. Section 323.2(d)(1), (iii), (2)(i),(ii), (3)(iii), (4)(iii) and 33 U.S.C. Section 323.4(a)(1)(i), (ii), (iii)(D), are reproduced at App., *infra*, 213-218.

STATEMENT

The fundamental issue in this case is whether a farmer and rancher may deeply plow his agriculturally-zoned ranchland to plant higher value crops without need of a federal permit or, conversely, whether the Corps has jurisdiction to regulate such traditional plowing activity under the Federal Clean Water Act ("CWA" or "Act"). The Corps asserts such jurisdiction in this case and others, contending that the traditional farming activity of *plowing alone* of dry ground in areas of seasonal wetlands constitutes the "discharge" of "pollutants" (native soil) from a "point source" (the plow) which is regulated under CWA Section 404.

The Corps' expansive claim of federal permitting jurisdiction over traditionally local activities – such as farming and plowing – under CWA Section 404[1] has resulted in conflict among the courts of appeals as to the statute's reach. The D.C. Circuit has held "incidental fallback" of native materials from a dredge bucket during aquatic dredging operations is not an "addition" of pollutants and thus not a "discharge" of dredged or fill material regulated under Section 404, because no materials are added and the disturbed native materials fall back to their same general location. *National Mining Ass'n. v. U.S. Army Corps of Eng'rs.*, 145 F.3d 1399, 1404 (D.C. Cir. 1998).

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[1] 33 U.S.C. § 1344, see App., *infra*, 210-211. Congress did not intend CWA Section 404 to extend to normal farming activities, which it contemplated would be "controlled by State and local agencies under [the Act's non-point source provisions]." S. Rep. No. 95-370, at 76 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4401.

It further held the CWA farmer exemptions for plowing and other normal farming activities evince that Congress "emphatically did not want the law to impede these bucolic pursuits." *Id.* at 1405.

The Ninth Circuit, by contrast in its 2-1 decision here (Judge Gould, dissenting), holds deep plowing – which also adds no materials and results in plowed native soil falling back to its same general location – produces a "regulable redeposit" of the plowed soil "pollutant" because it "constitutes environmental damage sufficient to constitute a regulable redeposit." App., *infra*, 8. Over the strong dissent of Judge Gould, who would have followed *National Mining* and held "the return of soil in place after deep plowing is not a 'discharge of a pollutant[,]' " App., *infra*, 18, the panel majority relied on the Ninth Circuit's prior decision holding redeposits of extracted and processed materials from in stream placer mining operations are regulated, and a Fourth Circuit decision (citing the same Ninth Circuit decision) holding "sidecasting" from backhoe dredging to drain wetlands for residential subdivision construction was regulated. *Rybachek v. United States EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990); *United States v. Deaton*, 209 F.3d 331, 333-336 (4th Cir. 2000). App., *infra*, 6-8.

Despite the express statutory exemption for any "discharges" from "normal farming . . . and ranching activities such as plowing . . . for the production of food, fiber . . . ," App., *infra*, 210, the Ninth Circuit also holds the "recapture" exception to the exemption applies because "[c]onverting ranch land to orchards and vineyards is clearly bringing the land 'into a use to which it was not previously subject[.]' " App., *infra*, 10; see App., *infra*, 211.

The Ninth Circuit's decision is legally erroneous and inconsistent with the CWA's plain language and legislative history, as well as *authorized* implementing regulations. Plowing alone does not "add" pollutants or soil

and does not produce regulated point source "discharges." No statute or regulation states plowing is a CWA-regulated activity. Moreover, the relevant statutes and regulations expressly *exempt all forms of plowing* from Section 404 regulation as required by Section 404(f)(1)'s "farmer exemptions." App., *infra*, 210; *see* App., *infra*, 212 (exempting agricultural runoff from point source program). No other case has ever invoked the facially-narrow "recapture provision" to hold plowing *alone* – as opposed to plowing conducted incidental to and as a minor part of other activities primarily intended to fill and dry out waters or wetlands – is a CWA-regulated activity. No other case has held plows used only for normal farming purposes are "point sources." Dissenting from the Ninth Circuit panel majority's complete evisceration of the Act's fundamental jurisdictional requirements and farmer exemptions, Judge Gould would have held return of soil in place after deep plowing is not a "discharge," because "deep ripping" does not involve any significant removal or "addition" of material to the site, and plows are not "point sources." App., *infra*, 19-22. He observed the majority was making new law in upholding federal regulation under Section 404's point source program of a traditional farming activity without any clear or express Congressional authorization of that result. App., *infra*, 22.

Given (1) the split among circuits on whether "incidental fallback" is a regulated "discharge," (2) the statutorily untenable basis of the Corps' position that it may regulate any form of mere plowing of agricultural land as a point-source discharge, (3) the nationwide importance of agriculture and (4) the nationwide importance of effectuating Congress' intent to meaningfully exempt farming activities from Section 404, this Court's review of the legality of the Corps's assertion of federal permitting jurisdiction over normal farming activities in this case is appropriate and necessary at this time. Congress did not

intend to federalize regulation of traditionally local land use matters when it adopted the CWA. It did not intend or envision when it enacted the CWA and its "farmer exemptions" that a farmer plowing dry, agriculturally-zoned ranchland to plant higher value crops – a normal activity farmers have engaged in since colonial times, App., *infra*, 18 – would require a federal permit for the "discharge" of "pollutants" from a "point source" to do so.

A. The Statutory and Regulatory Scheme

1. Basic Elements of Section 404 Jurisdiction

CWA Section 404 authorizes the Corps to directly regulate and issue federal permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C., § 1344(a); App., *infra*, 210. Section 301(a) provides that the "discharge of any pollutant by any person" is unlawful unless in compliance with the Act's permit requirements. § 1311(a); App., *infra*, 209. "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." § 1362(16), (12); App., *infra*, 212; *National Mining*, *supra*, 145 F.3d at 1401.[2] As a prerequisite to the existence of a regulated point source "discharge," the statute's plain text requires an "addition" of a "pollutant." To "add" is "to join or unite (to) so as to increase the number, size, quantity, etc." WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (Encycl. ed. 1977).

The courts below treated plowed native soil as both a "pollutant" and "fill material," and plows themselves as

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[2] CWA Sections 208 and 319 direct the States to take certain steps to address *non-point source* pollution, but the States determine the nature of those steps. See 33 U.S.C. §§ 1288, 1329. Farming and ranching activities are explicitly contemplated to fall within the non-point source area subject to State and local control. E.g., 33 U.S.C. §§ 1288(b)(2)(F), 1362(14).

regulated "point sources." "Pollutants" within the Act include, *inter alia*, "dredged spoil, . . . rock, sand, cellar dirt . . . and agricultural waste discharged into water." § 1362(6); App., *infra*, 211. "Fill material" has been held to mean material used for the "primary purpose" of replacing an aquatic area with dry land or changing the bottom elevation of a water body. *Resource Invs. v. U.S. Army Corps of Eng'rs.*, 151 F.3d 1162, 1168 (9th Cir. 1998); *National Mining, supra*, at 145 F.3d at 1402, fn. 1. A "point source" is defined as "any discernible, *confined and discrete conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. . . . " § 1362(14); App., *infra*, 212, emph. added.

The relevant "navigable waters" or "waters of the United States" on the semi-arid Borden Ranch are widely dispersed seasonal drainage swales and intermittent drainages – shallow linear features ranging from several inches to several feet wide, and up to several hundred feet long – which exist and carry stormwater runoff for brief periods only during and after seasonal rains, and which ultimately drain to intermittent streams, which themselves ultimately flow to tributaries of navigable waters. App., *infra*, 2; ER1011-12.[3] "Navigable waters" under the Act include wetlands *adjacent to* rivers, streams and more conventionally identifiable "waters", *National Mining, supra*, 145 F.3d at 1401, citing *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-32 & n. 8 (1985), but not isolated *intrastate* waters. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs.*

[3] As cited herein, "ER" is the "Excerpts of Record" from the Ninth Circuit's proceedings, "CR" is the Court Record, taken from the district court's Docketing Sheet, and "TE" is a district court Trial Exhibit.

("SWANCC"), 531 U.S. 159, 167-174 (2001); *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997). The Corps defines wetlands as areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *National Mining, supra*, 145 F.3d at 1401-1402.

2. The CWA's Farmer Exemptions

In 1977, Congress amended Section 404, adding "farmer exemptions" to clarify "that certain discharges, such as those associated with farming, silviculture, and ranching activities, are not prohibited or otherwise subject to regulation under § 404." *In re Carsten*, 211 B.R. 719, 731 (Bkrtcy. D. Mont. 1997). As amended, Section 404 *exempts* any "discharge":

> (A) *from normal farming*, silviculture, *and ranching activities such as plowing*, seeding, cultivating, minor drainage, harvesting *for the production of food, fiber, and forest products, or upland soil and water conservation practices;*. . . .

33 U.S.C. § 1344(f)(1)(A); App., *infra*, 210, emph. added.

Section 1344(f)(2)'s textually narrow "recapture" exception to these "farmer exemptions" requires a permit for:

> Any discharge of dredged or fill material into the navigable waters ***incidental*** *to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject*, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced. . . .

§ 1344(f)(2); App., *infra*, 211, emph. added.

The legislative history of the 1977 CWA "farmer exemptions" must be used to determine Congress' intent and provide context. *Harrison v. Northern Trust Co.*, 317

U.S. 476, 479 (1943); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972). The CWA farmer exemptions evince Congress "emphatically did not want the law to impede these bucolic pursuits." *National Mining, supra*, 145 F.3d at 1405.

The EPA and Army Corps expressly interpret the CWA to exempt plowing ranchland to plant crops in their regulations defining "plowing" as:

> . . . all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, disking, harrowing, and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. . . . *Plowing, as described above, will never involve a discharge of dredged or fill material.*

App., *infra*, 216; see *id.* at 218.

3. The Penalty Provision

As applied here, 33 U.S.C. Section 1319(d), App., *infra*, 209, authorizes civil penalties "not to exceed $25,000 per day for each violation" for discharging pollutants without a permit.

* * *

Petitioners challenge the Corps' assertion of federal permitting jurisdiction over the plowing of ranchland to plant crops in this case as in violation of CWA Section 404's jurisdictional limitations requiring a "discharge" of "pollutants" from a "point source," as well as its express exemption for "normal farming . . . and ranching activities such as plowing." Should this Court determine the Corps has Section 404 jurisdiction over plowing ranchland which is farmable in its natural state to plant crops, Petitioners challenge the lower courts' imposition of the maximum $25,000 penalty for each time a plow crossed a seasonal drainage feature, without regard to the number

of days on which such activity occurred, as violating Section 1319(d).

B. Petitioners' Plowing Activities On Borden Ranch and the Corps' Assertion of Jurisdiction

The 8,400-acre Borden Ranch is all agriculturally-zoned, Central Valley land, in both Sacramento and San Joaquin Counties, and is bisected by Dry Creek, the County Line. Presently owned by Borden Ranch Partnership ("BRP") (Tsakopoulos is managing partner and title holder) and its vendees, the Ranch has historically been used for cattle grazing, irrigated pasture, and growing wheat, hay, alfalfa, and row crops. Since late 1993, portions have been deep plowed and planted to vineyards and orchards. The Ranch contains seasonal hydrological features such as vernal pools, and swales and intermittent drainages (both hereinafter "drainages"). ER1011-12; App., *infra*, 2-3.

The Corps asserted CWA jurisdiction over the Ranch's drainages and vernal pools as "navigable waters" and contended that deep plowing, also known as "deep ripping" or "deep slip plowing," rangeland in delineated "waters" discharges *dredged or fill material* and requires a Section 404 permit. CR189, ER1013-1015; App., *infra*, 3.

Despite the Act and regulations, which exempt all forms of plowing, the Corps and EPA first distinguished deep plowing from shallower plowing. The Corps contended plowing in seasonal wetlands to "root zone depth," including disking, is not regulated but that deep plowing is. The Corps and EPA contended deep plowing would adversely affect "navigable waters" by puncturing restrictive subsurface soil layers believed integral to their inundation and functioning. TE30, ER13-15, 20-21, TE31, App. *infra*, 2-3. Relying on the Corps' oral and written advice, Tsakopoulos tried to plow in ways the Corps told him would not require CWA permits. CR204, ER921:8-16.

The Corps sought guidance from EPA in 1994 as to whether the CWA's farmer exemptions applied to Tsakopoulos' deep plowing. TE21, ER7. EPA confirmed the Corps' jurisdiction, and the Corps in late 1994 again distinguished deep plowing (prohibited without a permit) from shallow plowing at root zone depth, which it conceded was authorized under the exemptions without a permit and which one Corps regulator testified was 18 to 24 inches into the soil. TE30, ER13, CR204, ER910:18 – 911:2. Tsakopoulos authorized further plowing under the Corps' guidance until the winter rainy season, when it is not possible to plow once the ground becomes wet. CR204, ER909:3-6, CR226, ER981-983.

In 1995, Corps and Federal Natural Resources Conservation Service ("NRCS") officials met at the Ranch to discuss Tsakopoulos' plowing plans. NRCS advised deep-ripping through drainages had no hydrological impact and was a good farm management practice. CR204, ER915:11-20. The Corps continued to assert jurisdiction over deep plowing, but told Tsakopoulos orally and in writing he could deep rip uplands and cross areas delineated as "waters/wetlands" with the deep plow provided he raised the shank as high as possible even though it would still drag across and cut into the ground to some extent. TE31, ER20, TE558, ER16; see App., *infra*, 3. Tsakopoulos attempted to comply in authorizing additional 1995 plowing in Sacramento County. CR204, ER921:8-16. The Corps and EPA later claimed noncompliance and issued a November 1995 cease and desist order. App., *infra*, 3; TE50, ER30. Without conceding wrongdoing, Tsakopoulos settled the alleged 1995 plowing violations by dedicating a 1418-acre seasonal wetlands preserve (with 1368 contiguous acres) in May 1996. App., *infra*, 3-4, 165, 176; TE66, ER33, TE592, ER65.

In September 1996, Corps and EPA officials provided guidance for 1996 plowing on the Ranch's San Joaquin side, and reconfirmed that without a permit Tsakopoulos

could "deep plow" uplands and cross drainages with the plow shank raised. CR204, ER922-926. Tsakopoulos again attempted to comply in 1996 plowing, TE617, ER96, TE615, ER88, CR227, ER994-995, CR226, ER984-987, which plowing ended before December 1996. TE78, 80, 83, 85, 88, ER90, 97, 133, 148, 158.

The Corps' *first* official public guidance distinguishing "deep ripping" from other plowing was a December 12, 1996 Regulatory Guidance Letter ("RGL"). App., *infra*, 4, 199-207. The RGL came only after dedication of the preserve and after all plowing operations later found to be CWA violations had already occurred, App., *infra*, 103; CR189, ER1043:12-15; TE78, 80, 83, 85, 88; ER90, 97, 133, 148, 158, see CR204, ER909.

After the 1996-1997 rainy season, BRP resumed plowing (disking) in San Joaquin, and almost immediately EPA representatives unaware of the September 1996 guidance descended on the site, saw shallow furrows through some drainages (from *raised* deep plow shanks in 1996 plowing), and claimed some vernal pools were "clipped." CR226, ER970:17-973:23; App., *infra*, 4. Ignoring concerns expressed by EPA's Washington headquarters that deep plowing might not produce jurisdictional discharges in light of the D.C. district court's then-recent *American Mining* decision (affirmed on appeal in 1998 as *National Mining*), TE630, ER309, EPA Region 9 took an aggressive enforcement position and issued an April 1997 cease and desist order stopping all Ranch activity involving machinery crossing drainages. TE103, ER313; App., *infra*, 4.

C. Petitioners' Challenge To The Corps' Jurisdiction Over Plowing And The District Court's Ruling

Petitioners filed their Complaint May 6, 1997, for declaratory relief and to challenge Government regulations and the RGL. CR1, ER328. On August 6, the Government answered and counterclaimed alleging CWA

violations by "filling waters of the United States" on four Borden Ranch San Joaquin County parcels. CR7, ER385; App., *infra*, 4. By August 3, 1998 order, App., *infra*, 28-56, the district court denied Tsakopoulos' summary judgment motion, and partially granted and denied the Government's motion, leaving for trial the Counterclaim issues concerning alleged CWA violations. CR74, ER500-526; App., *infra*, 4-5. At the bench trial, from August 24 through September 16, 1999, App., *infra*, 5, the U.S. claimed Tsakopoulos' deep plowing in San Joaquin deposited "fill" into jurisdictional "waters" including drainages and pools.

Tsakopoulos disputed these claims and contended he *had* followed the Government's guidance by lifting the ripper shank to uppermost position when crossing drainages, resulting only in concededly unregulated shallow plowing. He also contended the six tiny pools allegedly filled were not jurisdictional "waters" within the Government's Commerce Clause power to regulate, since they were wholly isolated and not hydrologically connected to navigable waters, and were not actual migratory bird or endangered species habitat.

On November 8, 1999, the district court entered its 50-page Findings of Fact and Conclusions of Law. App., *infra*, 67-121, finding 348 separate deep plowing violations in 29 widely dispersed drainages (aggregating "about 2 acres" in total area) and 10 violations in a single 150 square foot vernal pool – the only one of six pools it found to be a jurisdictional water. App., *infra*, 5, 91, 98, 103, 105, 109; ER1030-1032. Despite Tsakopoulos' acknowledged efforts to follow the Corps' guidance, App., *infra*, 143-144, and the tiny area of alleged violations in comparison to the size of the Ranch area plowed and the area of wetlands/waters wholly avoided, App., *infra*, 105, 109, the court imposed a *$1.5 million* civil penalty. App., *infra*, 5, 118. On February 10, 2000, the court denied without hearing Tsakopoulos' Motion for

More Specific Findings as to the actual depth of the plowing violations it had found. App., *infra*, 5, 122-126. On March 3, 2000, final judgment was entered. App., *infra*, 127-134. Petitioners timely appealed on March 28, 2000. App., *infra*, 5; CR220, ER1092.

D. The Ninth Circuit's Decision

The Ninth Circuit affirmed the district court's decision in most respects in a 2-1 panel decision, the majority holding, over Judge Gould's dissent, that Petitioners' deep plowing of historical ranchland is regulated under CWA Section 404, App., *infra*, 210, which governs "discharges" of "pollutants," including "dredged or fill material," from "point sources" into "navigable waters." App., *infra*, 6-8.

The panel majority reasoned this case was like *Rybachek v. United States EPA*, 904 F.2d 1276 (9th Cir. 1990), which held *placer mining*, i.e., extracting raw materials from a stream, processing them to remove gold, and later returning the mining overburden to the stream at a distance from the original location, constituted "addition" of a "pollutant" and hence a Section 404 "discharge." It also relied on *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), which held "sidecasting" materials from the digging with a backhoe of a 1240-foot drainage ditch to drain wetlands for the purpose of *residential subdivision construction* produced a regulated "discharge." App., *infra*, 6-8. It rejected Petitioners' argument that purely deep plowing to prepare land for new crops is wholly unlike those unrelated activities and even less like an "addition" of pollutants than the "incidental fallback" the D.C. Circuit in *National Mining*, *supra*, 145 F.3d 1399 held unregulated under Section 404. It distinguished *National Mining* in cursory fashion in a footnote, stating that deep plowing "does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit." App., *infra*, 8, fn. 2.

Rejecting Petitioners' argument that plows are not "discernible, confined and discrete conveyance[s]" so as to constitute "point sources" under 33 U.S.C. Section 1326(14), the Ninth Circuit relied on a Fifth Circuit case holding "bulldozers and backhoes" *can* constitute "point sources" where they are not merely plowing to plant crops but performing *earthmoving, excavation and ditching activities* with engaged blades and shovels to dry out water bodies. App., *infra*, 8-9; *see Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 901, 920-921, 926-927 (5th Cir. 1983). The court reached this conclusion notwithstanding the undisputed fact that the bulldozers and tractors (not backhoes) pulling deep plows on Borden Ranch were not engaged in any such grading, excavation or ditching, and were simply performing a normal farming operation by using their motive power to drag normal farming implements – deep plow shanks – through soil to prepare it for the planting of deeper rooted crops. App., *infra*, 2-3.

The Ninth Circuit also rejected Petitioners' argument that even if deep plowing could somehow constitute a "point source" "discharge" it was exempt from regulation (and not recaptured) under the CWA's farmer exemptions for "normal farming . . . and ranching activities such as plowing[.]" App., *infra*, 210; *National Mining, supra*, 145 F.3d at 1405; *see* App., *infra*, 9-10.

Finally, in affirming the $1.5 million civil penalty, the Ninth Circuit panel majority ignored conflicting authority from the Fourth and Eleventh Circuit courts, and a published Ninth Circuit district court decision, in interpreting 33 U.S.C. Section 1319, App., *infra*, 209, to allow assessment of the maximum daily penalty for each time a plow shank crossed a drainage without regard to the number of days on which the activity occurred. App., *infra*, 13-16.

Dissenting Judge Gould found *Rybachek* and *Deaton* readily distinguishable and would have held plows are

not "point sources," App., *infra*, 22, and "that the return of soil in place after deep plowing" does not produce a regulated "discharge" under *National Mining, supra*, 145 F.3d 1399, App., *infra*, 18, because "deep ripping does not involve any significant removal or 'addition' of material to the site." *App., infra*, 19; see App., *infra*, 18-22. He would have held the "farmer exemptions" applicable to "deep plowing" even assuming, arguendo, that it produced regulated "discharges." App., *infra*, 21. Judge Gould stated the "crux of this case is that a farmer has plowed deeply to improve his farm property to permit farming of fruit crops . . . more profitable than grazing" and that farmers have engaged in such agricultural pursuits "from the beginning of our nation, and indeed in colonial times." App., *infra*, 18. In Judge Gould's view, the majority acted without clear or express Congressional direction, and beyond Congress' intent under the CWA, in prohibiting "a traditional form of farming activity." App., *infra*, 20, 22. Judge Gould states the majority opinion "makes new law by concluding that a plow is a point source and that deep ripping includes discharge of pollutants into protected waters," and concludes that "the judicial determination that a deep plowing technique constitutes a pollution of navigable waters, with no prior adequate guidance from Congress, goes beyond mere statutory interpretation." According to Judge Gould, the majority's holding rests on "an agency power too unbounded or judicial law making, which is worse." App., *infra*, 22.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the circuits are split over the fundamental jurisdictional reach of CWA Section 404 as it pertains to "incidental fallback," and because the Ninth Circuit's decision erroneously interprets several key elements of the statute resulting in expansive, intrusive and overreaching Federal regulatory

jurisdiction over normal farming activities, such as plowing, *which Congress emphatically never intended to regulate at all under the CWA*. *National Mining*, *supra*, 145 F.3d at 1405. As underscored by Judge Gould's dissent, App., *infra*, 18-22, the majority's decision ignores Congressional intent, eviscerates the Act's jurisdictional requirements and farmer exemptions, and substantially alters "the federal-state framework by permitting federal encroachment upon a traditional state power" *SWANCC*, *supra*, 531 U.S. at 173-174 , namely, the traditional state and local government authority to regulate the use of land for farming and agricultural activities.

I. THE CIRCUITS ARE SPLIT OVER THE CORPS' AUTHORITY TO REGULATE "INCIDENTAL FALLBACK" AS A POINT SOURCE DISCHARGE OF POLLUTANTS UNDER THE CWA

"Section 404(a) grants the Corps authority to issue permits 'for the discharge of dredged or fill material into the navigable waters at specified disposal sites.' " *SWANCC*, *supra*, 531 U.S. at 163; App., *infra*, 210. "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." *National Mining*, *supra*, 145 F.3d at 1401; App., *infra*, 212. The issue whether "redeposit" of native materials removed from and then returned to jurisdictional waters in "substantially the same spot" – referred to as "fallback" or "incidental fallback", *National Mining*, *supra*, 145 F.3d at 1401, 1403 – is a regulated "discharge" has produced disagreements among the courts of appeals.

The Fourth Circuit in *National Mining* invalidated the Corps' and EPA's so-called "Tulloch Rule," purporting to regulate any redeposit from any excavation activities, and held: (1) "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back,"

National Mining, *supra*, 145 F.3d at 1404; and (2) such "incidental fallback" (which occurs when material is dredged from a water, and some of it falls back off the dredge bucket into the same general location) is not an "addition" and thus not a regulated "discharge." *Id.* at 1403. *National Mining* distinguished *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990) – which it found was "the strongest authority for the agencies' position," *National Mining*, *supra*, 145 F.3d at 1406 – as involving a regulable discharge which was the "discrete act of dumping leftover material into the stream after it had been processed" rather than the "incidental fallback of dirt and gravel" to its original location. *Id.*, at 1406. The statute's use of the word "addition," as well as the phrase "specified disposal sites," shows "that Congress had in mind either a temporal or geographic separation between excavation and disposal which simply does not fit incidental fallback." *Id.*, at 1410, Silberman, J., concurring.

The Ninth Circuit gave short shrift to *National Mining*, rejecting it in a three-sentence footnote and following *Rybachek*, *supra*, 904 F.2d 1276 (9th Cir. 1990), which held *placer mining* operations extracting, processing and redepositing raw materials in a stream at considerable distance from the original location, constituted "addition" of a "pollutant." App., *infra*, 6. While *Rybachek* held return of extracted, processed mining overburden was addition of pollutants even though the overburden originated from the riverbed, the regulable "discharge" or "addition" was the discrete act of dumping the leftover material into the stream *after it had been extracted, collected and processed*. App., *infra*, 6; Rybachek, *supra*, 904 F.2d at 1285. The majority purports to follow *Rybachek* in holding the instantaneous turning in place by a plow of unextracted, uncollected and unprocessed native soil constitutes "addition" of a pollutant. App., *infra*, 8. This is, as Judge Gould stated in dissent, "incremental judicial reasoning" by which the majority extends *Rybachek* – and

Section 404 – to an entirely different context where it is simply inapposite. App., *infra*, 22.

The Ninth Circuit's rejection of *National Mining* was mistaken. Contrary to the majority's reasoning in its footnote attempting to distinguish *National Mining*, the distinction between "regulable redeposit" and unregulated "incidental fallback" depends on the existence of the jurisdictional prerequisite of an *addition* of material, not upon whether the involved activity supposedly "constitutes environmental damage sufficient to constitute a regulable redeposit." Compare App., *infra*, 8, fn. 2 with *National Mining, supra*, 145 F.3d at 1402-1403. Nowhere does the Ninth Circuit cite CWA or other authority for a standard it apparently created of whole cloth.

Unlike regulated "point source" discharges, plowing does not extract, hold, collect or remove native materials such that "redeposit" could occur. Even "incidental fallback" could not occur from any significant distance. Plows cut through, break up and turn soil in place while *adding nothing* and *redepositing nothing* from any collecting bucket, container, shovel, blade or other "confined" or "discrete conveyance" designed to hold or redistribute material. As Judge Gould stated, "[b]ecause deep ripping does not move any material to a substantially different geographic location and does not process such material for any period of time, *Rybachek* is not controlling." App., *infra*, 20. Judge Gould recognized *National Mining* could not be distinguished and should control because plowing produces, at most, "incidental fallback" of native soil which cannot be held to be a "discharge." He also recognized plows are not "point sources." App., *infra*, 22.

It is supremely ironic and significant that the Corps and EPA themselves argued in *National Mining* that *plowing*, among other exempt farming activities, *produced nothing more than "incidental fallback"* in an effort to convince the D.C. Court of Appeals in that case that such fallback was regulated; the agencies reasoned that Congress must

have considered the "incidental fallback" from these activities to be a regulated "discharge" or it would not have needed to include an exemption in the Act. *National Mining, supra*, 145 F.3d at 1405. In response to this argument, the *National Mining* Court stated:

> We find the exemptions far less telling. Some of the named activities – plowing, ditch maintenance, and the like – may produce fallback, but they may also produce actual discharges, i.e., addition of pollutants, so that § 404(f) accomplishes a useful purpose simply by exempting them insofar as they produce the latter. . . . [W]e are reluctant to draw any inference other than that Congress emphatically did not want the law to impede these bucolic pursuits.

National Mining, supra, 145 F.3d at 1405.

The Ninth Circuit's decision also conflicts with applicable Corps regulations, as interpreted by *National Mining* and its own previous decision, in holding native soil turned in place by a plow constitutes "fill" material, because the "primary purpose" of plowing is to enhance and revitalize farming soil, "not to replace an aquatic area with dry land or to change the bottom elevation of a water body[.]" *See Resource Invs., supra*, 151 F.3d at 1168 (9th Cir. 1998) (holding solid waste landfill leak detection and collection system placed in wetlands were not "fill material" under "primary purpose" test); *National Mining, supra*, 145 F.3d at 1401, fn. 1 (noting "primary purpose" requirement for defining "fill material").

Had petitioners' plowing occurred in the D.C. Circuit, the result in this case would have been different – under *National Mining* deep plowing would not be held a "discharge" subject to Section 404's permit requirements. In the Ninth Circuit, under *Borden Ranch*, it is. These issues are of national significance and fundamental importance to the farming, ranching and mining industries, as underscored by amici briefs and participation of

California Farm Bureau Federation, California Cattlemen's Association, California Mining Association and Pacific Legal Foundation, in support of Petitioners below and on appeal. The existence of Federal CWA Section 404 jurisdiction over "incidental fallback" from normal farming activities, such as plowing, should not depend on the happenstance of a farm's or ranch's location. Farmers and ranchers throughout the nation are entitled to equal treatment under the CWA, and the need for national uniformity is particularly great because farming activity completely unregulated in one jurisdiction could result in a multi-million dollar fines – or even criminal liability – if conducted in another. This case's exceptional importance warrants the granting of certiorari.

II. THE NINTH CIRCUIT ERRED IN HOLDING PLOWS ARE "POINT SOURCES"

An essential element of CWA Section 404 permitting jurisdiction is that the "pollutant" be "discharged" or "added" by a "**point source**," defined as "any discernible, confined and discrete conveyance." App., *infra*, 212. Regulation of potential sources of non-point source pollution is generally left to the States. E.g., 33 U.S.C. § 1288(b)(2)(F); see S. Rep. No. 95-370, at 76 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4401 (normal farming activities to be regulated as non-point sources by State and local agencies). A plow is not a "point source," i.e., a "confined and discrete conveyance," since it is neither "confined" nor a "container," nor does it function as a "conveyance" of pollutants/materials from one location to another. No prior case has ever held a plow is a "point source."

The Ninth Circuit's reliance on a Fifth Circuit case finding "bulldozers and backhoes" *can* constitute "point sources" is misplaced since there the bulldozers and backhoes were not used for merely plowing (by pulling plow shanks) but for entirely different purposes and

activities including performing earthmoving, excavation and ditching functions with engaged blades and shovels. *Avoyelles Sportsmen's League, Inc. v. Marsh, supra*, 715 F.2d at 901, 920-921, 926-927. In *Avoyelles*, the owner of a 20,000-acre tract leveled the property, cut down timber and vegetation with bulldozers with shearing blades, pushed, burned, raked and disked all these materials into the land's low spots to raise and level it, and further dug a drainage ditch, for the express purpose of filling and drying out a swampy Louisiana flood plain so that it could *thereafter* be farmed for soybeans. *Id.*, at passim, 926. The bulldozers and tractors (not backhoes) pulling deep plows on the semi-arid Borden Ranch were indisputably *not* engaged in any such grading, excavation or ditching, and were simply using their motive power to drag normal farming implements – deep plow shanks – through the soil to break it up, and turn it in place, i.e., *to plow*. Neither *Avoyelles* nor any other reported decision, until *Borden Ranch*, holds that *plowing alone* produces a "point source" discharge.

The issue is critical to the nation's farmers and not limited to deep plowing, as the agencies are now going beyond even their own unauthorized December 12, 1996 RGL and attempting to regulate even the *shallowest* forms of plowing – including disking – under the authority of the *Borden Ranch* decision. See, e.g., App., *infra*, 41, 48 (district court summary judgment order finds *both* deep ripping *and* disking are regulated).

III. THE NINTH CIRCUIT ERRED IN HOLDING THAT PLOWING RANCHLAND TO PLANT CROPS IS A "CHANGE IN USE" NEGATING THE CWA'S INTENDED BROAD EXEMPTION OF PLOWING AS A "NORMAL FARMING ACTIVITY"

It is wholly unnecessary to reach the issue of interpretation of the CWA's farmer exemptions if the Court

concludes that deep plowing produces no regulated point source "discharge" so as to fall under the Corps' CWA Section 404 permitting jurisdiction. Congress' 1977 CWA amendments were intended to *prevent regulatory overreaching* and make clear that *no permit is required in any event* for any alleged "discharge," i.e., "addition" of a pollutant:

> (A) *from **normal farming***, silviculture, ***and ranching activities such as plowing***, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;. . . .

App., *infra*, 210.

Congress provided a narrow "recapture" provision removing from the exemption:

> Any discharge of dredged or fill material into the navigable waters ***incidental*** *to any activity having as its purpose bringing an area of the navigable waters into a use* ***to which it was not previously subject***, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.

App., *infra*, 211, emph. added. This exception is not concerned with any "discharges" from the isolated activity of plowing productive farm or ranchland in its natural state, or with changes in agricultural use, such as from pasture and forage crop to orchard/vineyard crop. Rather, it addresses *intentional conversion of unproductive wetlands to drylands on a significant scale* to *enable* normal farming activities *which could not otherwise occur. In re Carsten, supra*, 211 B.R. at 735.

Thus, where activities are done for the primary purpose of draining and drying out significant water bodies to convert them to farmable uplands – i.e., the *Avoyelles* situation – the exemption cannot be claimed on the grounds that otherwise unregulated farming activities,

such as plowing, are later performed "incidental to," i.e., as a "minor concomitant," AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE ED. (1975), p. 665, of the primary conversion project. This reasonable interpretation is compelled by the plain language of the "farmer exemptions", Congress' clear intent to meaningfully exempt normal farming activities from onerous federal regulation under the CWA's "point source" program, the lawful agency regulations expressly exempting all forms of plowing, and related statutes.[4]

The Ninth Circuit relied on the "recapture" provision as interpreted by *Avoyelles, supra*, 715 F.2d at 925, and another Ninth Circuit decision, *United States v. Akers*, 785 F.2d 814, 820 (9th Cir. 1986), to hold petitioners' deep plowing to plant vineyards and orchards was not exempt and was "recaptured" because it supposedly "radically altered the hydrological regime of protected wetlands." App., *infra*, 10. The Ninth Circuit confused the normal activity of converting from one agricultural crop to another with that of converting waters to uplands, and erroneously reasoned, that "[c]onverting ranch land to

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[4] For example, Congress subsequently enacted "Swampbuster" in the 1985 Food Security Act ("FSA"). Under the FSA "there will be liability for conversion of a wetland *if it is manipulated 'for the purpose or to have the effect of' making the land farmable." Downer v. U.S. By And Through Dept. of Agriculture*, 894 F.Supp. 1348, 1356 (D.S.D. 1995), emph. added, aff'd 97 F.3d 999 (8th Cir.). Statutes *in pari materia* are construed together. BLACK'S LAW DICTIONARY (5th ed. 1979), p. 711. "Wetlands" subject to being farmed by use of "normal cropping or ranching practices" (i.e., plowing) as a result of their "natural condition" (e.g., drought or, as here, regular dryness in a semi-arid region throughout the long growing season) are *not* deemed converted (i.e., brought into a use to which they were not already subject) when so farmed. *Merely* plowing (without more) thus triggers neither FSA farm subsidy ineligibility under "Swampbuster" *nor* CWA Section 404's recapture provision.

orchards and vineyards is clearly bringing the land into a use to which it was not previously subject . . . " *Id.* at 815. If this were true, then any change in agricultural crop or practice could subject plowing to federal regulation, and CWA Section 404's exemption for plowing ranchland to plant crops, App., *infra*, 218, would be rendered meaningless. Indeed, under the Ninth Circuit's interpretation, Section 404(f)(1) is a mere "grandfather" clause which would not apply at all to plowing historically ranched land for the first time either to improve the forage or to plant non-forage crops. The CWA's legislative history refutes this crabbed interpretation of the "farmer exemptions" and shows Congress never intended to regulate mere plowing at all under the CWA.

Senator Muskie, a primary CWA sponsor, *Avoyelles, supra*, 715 F.2d at 915, explained "the bill [adding farmer exemptions] tries to free from the threat of regulation those kinds of man made activities which are sufficiently de minimis as to merit general attention at the state and local level and little or no attention at the national level." Vol. 3, A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977 (1978) (hereafter "1977 LEG. HIST.") at 645 (CR36, ER489) (Senate Report on S. 1952, 95th Cong.); *see also id.* (*Vol.* 4) at 924 (ER 492) (Domenici comments); 181 (ER482) (President's comments); 289, 351, 524 (ER481, 483, 487) (Stafford comments). Where, as here, plowing is a permitted farming activity under locally-enacted agricultural zoning and other State and local regulations, Congress intended the federal government to have no role under the CWA.

During the December 15, 1977 Senate debate, Senator Muskie recognized the 1972 CWA's basic objective was "to eliminate toxic pollutants in toxic amounts" *id.*, 426, ER484, and stated of the "farmer exemptions":

> The conferees agree to adopt *the Senate amendment that legislatively clarifies the exclusion of certain activities that do not typically involve point source discharges of dredged or fill material . . . plowing, seeding, cultivating, harvesting, minor*

> *drainage, and soil and water conservation practices performed on uplands were not intended to require section 404 permits. . . .* [¶] *. . . While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.*

ER485, emph. added; *see also* 4 1977 LEG. HIST. at pp. 919-920 (ER490-491) (Chafee comments); *see* ER495, 493, 494. The legislative history shows Congress never intended to regulate pure plowing under the CWA and never even considered it to produce "discharges."

The implementing agency regulations accordingly exclude *all* plowing from CWA regulation. 33 CFR Section 323.2(f), for example, provides "fill" is *addition* of material and *never* includes plowing. EPA's regulations provide:

> ***Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade, disking, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. . . .***
>
> ***Plowing, as described above, will never involve a discharge of dredged or fill material.***

App., *infra*, 218, emph. added.

Nor does the case law support the Ninth Circuit's unwarranted extension of Section 404 jurisdiction to purely farming activities. In *Akers*, the farmer purchased a 9,600 acre property which contained 2,889 acres of wetlands – known as the "Big Swamp" – on which he planned to "carry out extensive grading, leveling, drainage and water diversion to convert the wetlands to farmlands suitable for growing upland crops." *Akers, supra*, 785 F.2d at 816-817. Toward this end, he constructed a 3-mile long dike and 50-foot wide ditch to drain the

wetlands. *Id.* Based on Akers' *extensive dike building, grading, leveling and water diversion activities*, which were specifically designed to convert the marshy Big Swamp from non-farmable land into farmable land, the Ninth Circuit "affirm[ed] the injunction [against Akers] as a reasonable response *to the peculiar facts before [it].*" *Id.* at 820, emph. added. It did *not* endorse the Government's more extreme arguments, including arguments that "mere discing of soil" constituted a point source discharge of pollutants and that farmers required CWA permits to change from one wetland crop to another. *Id.* at 820; see *id.* at 819 (holding farmer exemptions inapplicable because court "cannot view Akers' plowing, discing and seeding in isolation" from other activities). *Akers* never held mere plowing of *already-farmable* land *alone* was regulated. Petitioners' plowing here *must* be viewed in isolation, because that is undisputedly how it occurred, on semi-arid ranchland already dry enough to plow and plant in its natural state. No case has ever held the Corps' CWA Section 404 jurisdiction extends to regulating *mere plowing* on land dry enough to farm in its natural state *without first undertaking extraordinary conversion activities*.

To the extent the Ninth Circuit unduly deferred to EPA's unauthorized application and interpretation of the CWA and its own regulations, its decision conflicts with this Court's *SWANCC* decision, which makes clear that the States retain traditional and primary power to regulate land and water use. *SWANCC, supra*, 531 U.S. at 174, citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). As recognized by the CWA, farmers' and ranchers' agricultural land uses, including activities like plowing, are traditional matters of state and local, not federal, control. 33 U.S.C. §§ 1288, 1329; App., *infra*, 210, 212. Where administrative statutory interpretation is not only clearly erroneous but alters the federal-state framework by permitting federal encroachment on traditional state powers, courts do *not* apply the deferential standard

of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *SWANCC, supra*, 531 U.S. at 173. Rather, in such cases, Congress must "convey its purpose clearly" or courts will deem it not to "have significantly changed the federal state balance." *Id., quoting United States v. Bass*, 404 U.S. 336, 349 (1971).

The Ninth Circuit's expansive definition of the terms "discharge," "addition," "point source" and "pollutant", and narrow interpretation of the farmer exemptions, so as to include the pure plowing done in this case within the Corps' CWA Section 404 jurisdiction, substantially expands federal power to an unprecedented extent at the expense of State and local authority. *SWANCC* forbids this absent Congress' clearly-expressed intent. As Judge Gould stated, "If Congress intends to prohibit so natural a farm activity as plowing, and even the deep plowing that occurred here, Congress can and should be explicit. Although we interpret the prohibition of the [CWA] to effectuate Congressional intent, it is an undue stretch for us absent a more clear directive from Congress, to reach and prohibit the plowing done here, which seems to be a traditional form of farming activity." App., *infra*, 19-20.

IV. THE NINTH CIRCUIT ERRED IN CALCULATING THE CIVIL PENALTY BY CALCULATING EACH PASS OF THE PLOW THROUGH WATERS, RATHER THAN EACH DAY OF PLOWING, AS A SEPARATE VIOLATION UNIT

If one assumes, solely *arguendo*, that plowing alone is a regulable activity under CWA Section 404, the Ninth Circuit nevertheless erred *as a matter of law* when it held the maximum CWA penalty was properly calculated by multiplying the *number of passes* the district court found were made by the plow, App., *infra*, 12-16, through each jurisdictional feature by the statutory dollar amount rather than multiplying the *number of days* during which

plowing "discharges" occurred in particular "waters" by the statutory dollar amount.

33 U.S.C. Section 1319(d), App., *infra*, 209, authorizes civil penalties "not to exceed $25,000 *per day for each violation*" against persons violating Section 1311(a) by discharging pollutants without a permit. This statute contemplates maximum penalties will be calculated not in terms of the total number of individual violations of the same type, but, rather, in terms of *daily violation units*. The "top-down" method of penalty assessment (employed here) involves calculating the maximum statutory penalty by first finding how many distinct *categories* of CWA violations occurred, and then finding the number of *days* during which each category occurred and multiplying the number of days by $25,000. *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 791 F.2d 304, 314 (4th Cir. 1986) vacated and remanded on other grounds, 484 U.S. 49 (§ 1319(d) speaks "in terms of penalties *per day* of violation, rather than *per violation.*"); *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1139 (11th Cir. 1990) ("each *distinct* violation is subject to a separate *daily* penalty assessment of up to $25,000 . . . "); *Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F.Supp. 1368, 1395 (D. Haw. 1993) (discussing top-down method of calculating number of categories and "*daily violations*" to arrive at maximum penalty).

The *Gwaltney* court rejected defendant's interpretation there as untenable because it impermissibly calculated the statutory maximum penalty *"per violation,"* rather than *"per day* of violation." *Gwaltney, supra*, 791 F.2d at 314. The Ninth Circuit and district courts here, too, read the words "per day" out of the statute and impermissibly divided daily soil discharges within a single category of violation into hundreds of separate violations. App., *infra*, 12-16. Under *Gwaltney*, Tsakopoulos' *maximum* penalty should have been limited to, at most, the *number of days* during which the same type of "point

source discharges" of soil actually occurred in particular waters. Counting as separate violation units the number of times a single point source (i.e., a plow shank) crossed a single jurisdictional feature during a single day impermissibly converts a single *daily* violation unit of the same activity into numerous sub-daily violation units and illegally establishes the maximum penalty "per violation, rather than per day of violation" – a result "inconsistent with the language of § 1319(d)." *Gwaltney, supra*, 791 F.2d at 314.

Where the "violation unit" is measured by less than a single day's period of time – for example, an "hourly maximum violation" occurring multiple times during the same day – the CWA limits the maximum penalty to *one day* for all such violations *if they are of the same type. United States v. Amoco Oil Co.*, 580 F.Supp. 1042, 1046, n. 1 (W.D. Mo. 1984), cited with approval by *Tyson Foods, supra*, 897 F.2d at 1138, 1138-1139 (holding Congress amended § 1319(d)'s language to its current "per day for each violation" to clarify the statute in accordance with *Amoco*'s interpretation).

Tsakopoulos' alleged violations *all* fell within the *single distinct category* of alleged discharge of a single "pollutant" – "fill" from native soil turned in place – from a "point source" without a permit. App., *infra*, 15. In performing its "top-down" analysis, the court should have added the number of *daily* violations of this category and multiplied that total by $25,000. *Hawaii's Thousand Friends, supra*, 821 F.Supp. at 1395. Despite extensive evidence introduced by the Government in the form of daily time records of the deep plow operators, the lower courts failed to engage in *any* analysis of the number of *days* on which such plowing occurred in either fall 1995 or fall 1996 on the Ranch's San Joaquin side, and never even *estimated* the number of daily violation units. CR189, ER1042-1043.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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BORDEN RANCH PARTNERSHIP; Angelo K. Tsakopoulos, Plaintiffs-Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; United States Environmental Protection Agency, an agency of the United States, Defendants-Appellees.

No. 00-15700.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 9, 2001.

Filed Aug. 15, 2001

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Sylvia Quast (argued), U.S. Department of Justice, Environment and Natural Resources Division, Washington, D.C., for the defendants-appellees.

Appeal from the United States District Court for the Eastern District of California Garland E. Burrell, District Judge, Presiding. D.C. No. CV-97-00858-GEB (JFM).

Before: CANBY, HAWKINS, and GOULD, Circuit Judges.

MICHAEL DALY HAWKINS, Circuit Judge:

This appeal concerns the authority of the U.S. Army Corps of Engineers ("the Corps") and the Environmental Protection Agency ("EPA") over a form of agricultural activity called "deep ripping" when it occurs in wetlands. We conclude that the Clean Water Act applies to this

activity and affirm the district court's findings that Borden Ranch violated the Act by deep ripping in protected wetland swales. We reverse the district court's findings of liability with respect to isolated vernal pools in light of *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001), and remand for a recalculation of the civil penalties.

Facts and Procedural Background

In June of 1993, Angelo Tsakopoulos, a Sacramento real estate developer, purchased Borden Ranch, an 8400 acre ranch located in California's Central Valley. Prior to Tsakopoulos's purchase, the relevant areas of the ranch had been used primarily as rangeland for cattle grazing. The ranch contains significant hydrological features including vernal pools, swales, and intermittent drainages. Vernal pools are pools that form during the rainy season, but are often dry in the summer. Swales are sloped wetlands that allow for the movement of aquatic plant and animal life, and that filter water flows and minimize erosion. Intermittent drainages are streams that transport water during and after rains. All of these hydrological features depend upon a dense layer of soil, called a "restrictive layer" or "clay pan," which prevents surface water from penetrating deeply into the soil.

Tsakopoulos intended to convert the ranch into vineyards and orchards and subdivide it into smaller parcels for sale. Vineyards and orchards, however, require deep root systems, much deeper than the restrictive layer in the relevant portions of Borden Ranch permitted. For

vineyards and orchards to grow on this land, the restrictive layer of soil would first need to be penetrated. This requires a procedure known as "deep ripping," in which four- to seven-foot long metal prongs are dragged through the soil behind a tractor or a bulldozer. The ripper gouges through the restrictive layer, disgorging soil that is then dragged behind the ripper.

Under the Clean Water Act, an individual seeking to fill protected wetlands must first obtain a permit from the Corps. Since 1993, Tsakopoulos and the Corps have disagreed about the Corps' authority to regulate deep ripping in wetlands. Tsakopoulos initiated deep ripping without a permit in the fall of 1993, and the Corps granted him a retrospective permit in the spring of 1994, when Tsakopoulos agreed to various mitigation requirements. In the fall of 1994, the Corps and the EPA informed Tsakopoulos that he could deep rip in uplands and that he could drive over swales with the deep ripper in its uppermost position, but that he could not conduct any deep ripping activity in vernal pools. The next spring, the Corps discovered that deep ripping had occurred in protected wetlands and promptly issued a cease and desist order. From July 1995 through November 1995, Tsakopoulos again initiated deep ripping on various parcels of land without a permit. The Corps concluded that more protected wetlands had been ripped and again issued a cease and desist order.

In May of 1996, the Corps and the EPA entered into an Administrative Order on Consent with Tsakopoulos that was intended to resolve his alleged Clean Water Act violations. Under the agreement, Tsakopoulos set aside a

1368-acre preserve and agreed to refrain from further violations.

In December of 1996, the Corps and the EPA issued a regulatory guidance letter that distinguished deep ripping from normal plowing activity. The letter stated that deep-ripping in wetlands "destroy[s] the hydrological integrity of these wetlands" and therefore "requires a permit under the Clean Water Act."[1]

In March of 1997 the Corps concluded that Tsakopoulos had continued to deep rip wetlands without permission. That April, EPA investigators visited the ranch and observed fully engaged deep rippers passing over jurisdictional wetlands. EPA then issued an Administrative Order to Tsakopoulos.

Tsakopoulos responded by filing this lawsuit, challenging the authority of the Corps and the EPA to regulate deep ripping. The United States filed a counterclaim seeking injunctive relief and civil penalties for Tsakopoulos's alleged violations of the Clean Water Act.

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[1] In the district court, Tsakopoulos argued that this letter was invalid. The district court found that "it is unclear whether the regulatory guidance letter has actually been applied to Plaintiffs. Therefore decision is reached without reference to it." The district court also found that "any as-applied challenge to the regulations that might also include a challenge to the application of the [regulatory guidance letter] is not ripe."

On appeal, Tsakopoulos again challenges the regulatory guidance letter, arguing for the first time that the letter is a substantive rule that required notice-and-comment rule making. Since this new argument was not presented to the district court, we decline to consider it on appeal. *See Nelson v. City of Irvine*, 143 F.3d 1196, 1205-06 (9th Cir.1998).

Both parties filed motions for summary judgment. The district court ruled that the Corps has jurisdiction over deep ripping in jurisdictional waters. However, the court found disputed facts with respect to whether such deep ripping had actually occurred. These facts were litigated in a bench trial that began on August 24, 1999, and concluded on September 16, 1999. The district court heard evidence from over twenty witnesses and received hundreds of documentary exhibits.

The district court subsequently entered findings of fact and conclusions of law determining that Tsakopoulos had repeatedly violated the Clean Water Act. The court found 348 separate deep ripping violations in 29 drainages, and 10 violations in a single vernal pool. The district court gave Tsakopoulos the option of paying a $1.5 million penalty or paying $500,000 and restoring four acres of wetlands. Tsakopoulos chose the latter option. After denying a motion for more specific findings of fact, the district court entered its final order in favor of the United States.

Tsakopoulos then brought this timely appeal. We have jurisdiction under 28 U.S.C. § 1291.

Analysis

I. Corps Jurisdiction over Deep Ripping

The Clean Water Act prohibits "the discharge of any pollutant" into the nation's waters. 33 U.S.C. § 1311(a). The nation's waters have been interpreted to include wetlands adjacent to navigable waters. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-35, 106

S.Ct. 455, 88 L.Ed.2d 419 (1985). The Act defines discharge as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A point source is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A pollutant is defined, *inter alia*, as "dredged spoil, . . . biological materials, . . . rock, sand, [and] cellar dirt." 33 U.S.C. 1362(6). It is unlawful to discharge pollutants into wetlands without a permit from the Army Corps of Engineers. 33 U.S.C. § 1344(a),(d).

A. Discharge of a Pollutant

Tsakopoulos initially contends that deep ripping cannot constitute the "addition" of a "pollutant" into wetlands, because it simply churns up soil that is already there, placing it back basically where it came from. This argument is inconsistent with Ninth Circuit precedent and with case law from other circuits that squarely hold that redeposits of materials can constitute an "addition of a pollutant" under the Clean Water Act. *Rybachek v. United States Envtl. Prot. Agency*, 904 F.2d 1276 (9th Cir.1990), considered a claim that placer mining activities were exempt from the Act. We held that removing material from a stream bed, sifting out the gold, and returning the material to the stream bed was an "addition" of a "pollutant." *Id.* at 1285. The term "pollutant" encompassed "the materials segregated from gold in placer mining." *Id.*

Our reasoning in *Rybachek* is similar to that of the Fourth Circuit in *United States v. Deaton*, 209 F.3d 331 (4th

Cir.2000). In *Deaton*, a property owner alleged that the Corps could not regulate "sidecasting," which is "the deposit of dredged or excavated material from a wetland back into that same wetland." *Id.* at 334. The property owner asserted that "sidecasting results in no net increase in the amount of material present in the wetland" and therefore could not constitute the "addition of a pollutant." *Id.* at 335. The Fourth Circuit squarely rejected this argument, in language that is worth quoting in full:

> Contrary to what the Deatons suggest, the statute does not prohibit the addition of material; it prohibits the "addition of any pollutant." The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here. . . . Once [earth and vegetable matter] was removed [from the wetland], that material became "dredged spoil," a statutory pollutant and a *type* of material that up until then was not present on the Deaton property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before.

Id. at 335-36. As the court concluded, "Congress determined that plain dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing harm to the environment." *Id.* at 336; *see also Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d

897, 923 (5th Cir.1983) (holding that the word "addition" may be reasonably understood to include "redeposit").

These cases recognize that activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else. In this case, the Corps alleges that Tsakopoulos has essentially poked a hole in the bottom of protected wetlands. That is, by ripping up the bottom layer of soil, the water that was trapped can now drain out. While it is true, that in so doing, no new material has been "added," a "pollutant" has certainly been "added." Prior to the deep ripping, the protective layer of soil was intact, holding the wetland in place. Afterwards, that soil was wrenched up, moved around, and redeposited somewhere else. We can see no meaningful distinction between this activity and the activities at issue in *Rybachek* and *Deaton*. We therefore conclude that deep ripping, when undertaken in the context at issue here, can constitute a discharge of a pollutant under the Clean Water Act.[2]

Tsakopoulos also contends that no case has ever held a plow to be a point source, and that a prohibited discharge must be from a point source. This argument has no merit. The statutory definition of "point source" ("any

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[2] *National Mining Assoc. v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C.Cir.1998), upon which Tsakopoulos heavily relies, does not persuade us to the contrary. That case distinguished "regulable redeposits" from "incidental fallback." *Id.* at 1405. Here, the deep ripping does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit.

discernible, confined, and discrete conveyance") is extremely broad, 33 U.S.C. § 1362(14), and courts have found that "bulldozers and backhoes" can constitute "point sources," *Avoyelles*, 715 F.2d at 922. In this case, bulldozers and tractors were used to pull large metal prongs through the soil. We can think of no reason why this combination would not satisfy the definition of a "point source."

B. The Normal Farming Exception

Tsakopoulos next contends, that even if deep ripping constitutes a discharge of pollutants, it is nonetheless exempt from regulation under the "farming exceptions," which state that discharges "from normal farming . . . and ranching activities, such as plowing" are not subject to the Clean Water Act. 33 U.S.C. § 1344(f)(1)(A). The section of the statute containing the farming exceptions, however, includes a significant qualifying provision:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2). Thus, even normal plowing can be regulated under the Clean Water Act if it falls under this so-called "recapture" provision. *See Avoyelles*, 715 F.2d at 925 (noting that § 1344(f)(2) can preclude the normal farming exceptions).

We conclude that the deep ripping at issue in this case is governed by the recapture provision. Converting ranch land to orchards and vineyards is clearly bringing the land "into a use to which it was not previously subject," and there is a clear basis in this record to conclude that the destruction of the soil layer at issue here constitutes an impairment of the flow of nearby navigable waters.

Although the Corps cannot regulate a farmer who desires "merely to change from one wetland crop to another," activities that require "substantial hydrological alterations" require a permit. *United States v. Akers*, 785 F.2d 814, 820 (9th Cir.1986). As we have explained, "the intent of Congress in enacting the Act was to prevent conversion of wetlands to dry lands," and we have classified "as non-exempt those activities which change a wetland's hydrological regime." *Akers*, 785 F.2d at 822. In this case, Tsakopoulos's activities were not intended simply to substitute one wetland crop for another; rather they radically altered the hydrological regime of the protected wetlands. Accordingly, it was entirely proper for the Corps and the EPA to exercise jurisdiction over Tsakopoulos's activities.

II. The Vernal Pool

The district court found Clean Water Act violations in one isolated vernal pool on Tsakopoulos's property. Earlier this year, the Supreme Court ruled in *Solid Waste* that the Corps' rule extending the definition of "navigable waters" under the Clean Water Act to include intrastate waters used as habitat for migratory birds exceeds the

authority granted to the Corps under the Clean Water Act. The government now concedes that *Solid Waste* precludes Corps' authority over the vernal pool in dispute and has formally withdrawn its enforcement claim with respect to the pool. We accordingly reverse the district court's findings of Clean Water Act violations in the vernal pool.

III. The District Court's Factual Findings

Tsakopoulos challenges the district court's factual findings of violations of the Clean Water Act. We review for clear error. *Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1024 (9th Cir.1999).

Tsakopoulos argues that "there was no substantial evidence at all" to support the court's factual findings of deep ripping in protected swales. He argues that the evidence can only demonstrate shallow ripping consistent with the ripper in its uppermost position, which was permitted under the government's direction.

"Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Cree v. Flores*, 157 F.3d 762, 768 (9th Cir.1998). The district court here held a four-week bench trial, examined numerous exhibits, and heard over twenty witnesses. There is ample evidence to support the district court's findings. The court cited documentary evidence showing deep ripping, eyewitness testimony of deep ripping on the property, and Tsakopoulos's own concession that "mistakes had been made." The court also relied on the studies of Dr. Lyndon Lee, who conducted extensive investigations at the site. Dr. Lee was able to

dig soil pits as far as thirty inches into the soil. By examining the composition of the soil in these pits, Dr. Lee could determine whether the underlying clay layer had been ripped up, consistent with deep ripping. The district court chose to credit this evidence that deep ripping had occurred, and we can find no clear error on this record.

IV. The Civil Penalty

The district court found that Tsakopoulos had committed 358 violations of the Clean Water Act. It counted each pass of the ripper through a protected wetland as a separate violation. The statute provides for a maximum penalty of "$25,000 per day for each violation." 33 U.S.C. § 1319. The statutory maximum penalty was therefore $8,950,000. The court then considered a variety of factors in setting the penalty. The court found that Tsakopoulos "risked damaging rare federal wetlands because of his motivation to reap economic gain." The court also found an "absence of a good faith attempt to comply with the Act." The court accordingly set the penalty at $1,500,000, which is $7,450,000 below the statutory maximum. The court also allowed Tsakopoulos to suspend $1,000,000 of the penalty if he performed various restoration measures.

Tsakopoulos now makes three challenges to the district court's calculation of the civil penalty. We conclude that none of these arguments has merit.

A. Penalty Calculation per Violation

Tsakopoulos first contends that the penalty should have been based on the number of days in which illegal ripping occurred, not on the number of individual passes with the ripper. He argues that the statutory language "per day for each violation" means that he can only be assessed $25,000 for any day in which ripping violations occurred, regardless of the total number of rippings in that day.

We disagree. The statute imposes a maximum penalty "per day for each violation." 33 U.S.C. § 1319(d). It does not say "per each day in which violations occur" or "per day in which a party pollutes." The focus is clearly on *each* violation, and courts have consistently rejected attempts to limit civil penalties to the number of days in which violations occur. A contrary rule would encourage individuals to stack all their violations into one "Pollution Day," in which innumerable offenses could occur, subject only to the $25,000 maximum.

Tsakopoulos relies most heavily on *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir.1986), *vacated*, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). In *Gwaltney*, the court considered a case of continuous violations of monthly permits. The violator argued that a monthly violation should be treated as a single day of violation. *Id.* at 313. The court disagreed, concluding "where a violation is defined in terms of a time period longer than a day, the maximum penalty assessable for that violation should be defined in terms of the number of days in that time period." *Id.* at 314. The

court explicitly declined to reach the very different question of "whether multiple violations attributable to a single day may give rise to a maximum penalty in excess of [the penalty amount] for that day." *Id.* at 308.

This question was addressed in *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir.1990). The court found that the statutory provision was "not a model of clarity," but nonetheless found that it was "capable of only a single reasonable interpretation: the daily maximum penalty applies separately to each violation of an express limitation." *Id.* at 1137, 1138. The court stated that "*each* excessive discharge of a pollutant on a given day will subject the polluter to a $25,000 maximum fine." *Id.* at 1139. This interpretation was consistent with the legislative history, which stated that the provision was intended "to clarify that each distinct violation is subject to a separate daily penalty assessment." *Id.* (citation omitted).

The Fourth Circuit adopted similar reasoning in *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 528 (4th Cir.1999). The court noted the serious incentive problems of a contrary ruling: "[I]f the maximum penalty that could be levied against a violator on a single day was $25,000, no matter how many different Permit effluent limitations were violated, the permittee would have a strong disincentive to comply with the other permit limitations." *Id.* at 527-28. Accordingly, the court treated each permit violation "as a separate and distinct infraction for purposes of penalty calculation." *Id.* at 528.

We recognize that these cases do not precisely resolve the problem at issue here. These cases are concerned with

emission of different types of pollutants in violation of different permits. This case is about repeated filling of wetlands without a permit. Here, the landowner committed the same unlawful act repeatedly. Tsakopoulos argues that treating each rip as a separate violation could lead to nonsensical results in other cases. For example, a polluter who emitted 25,000 gallons of a pollutant into a stream continuously over the course of a day would be subject to a $25,000 maximum penalty, whereas a polluter who made three separate discharges of one gallon each would be subject to a $75,000 maximum penalty.

Tsakopoulos's position, however, also leads to irrational results. The incentive problems at issue in *Smithfield* are equally strong here. Once a wetland violation has occurred in part of a swale, Tsakopoulos's proposed rule would allow the landowner to rip away at the rest of the swale with impunity from that point forward, because no additional penalty could be imposed.

Although neither approach is free from difficulty, we believe the better rule is to treat each rip as a separate violation. This approach is more consistent with the statutory language, with prior judicial interpretations of the statute, and with the general policy goal of discouraging pollution. Tsakopoulos's concern about the disparate treatment of the polluter who emits several small amounts and the serial continuous polluter is not without remedy in the district courts. The district courts have substantial discretion in imposing penalties, and, as the *Gwaltney* court pointed out in response to a similar argument, the district court "could . . . impose a substantially smaller penalty on [the] hypothetical polluter than on [the larger polluter]." 791 F.2d at 315.

In sum, we conclude that the district court correctly included each pass of the ripper as a separate violation. A limited remand for recalculation of the penalty is nonetheless in order. The district court included 10 passes through the vernal pool in its total of 358 violations. Since the government now concedes that it lacks jurisdiction over these violations, we remand to the district court to determine what, if any, reduction in the penalty is appropriate.

B. The Simpson Timber Consent Decree

Tsakopoulos argues that the penalty imposed here is significantly disproportionate to the penalty imposed in the settlement of violations by the Simpson Timber Company, which deep ripped 987 acres, but was subject only to a $30,000 penalty and a restoration order. By contrast, Tsakopoulos committed violations on only two acres. The district court found that the Simpson Timber consent decree had no relevance to the determination of the civil penalty here, because consent decrees are different from judgments reached after extensive litigation and because that decree imposed significant restoration requirements.

The district court did not abuse its discretion. Tsakopoulos knowingly assumed the risk that litigation would result in a judgment more unfavorable than he might have attained through settlement. Having assumed that risk, Tsakopoulos cannot now be heard to complain that his penalty should have been assessed as if he had settled the case. In any event, the statute directs that these disputes be evaluated on a case-by-case basis. Since we know almost nothing about the facts of the Simpson

Timber dispute, it is impossible to conclude that the district court's careful analysis of the penalty issue on the facts of this case was an abuse of discretion.

C. Further Reductions in Penalty

Tsakopoulos finally argues that the district court should have reduced the penalty further because of Tsakopoulos's good faith, the trivial nature of the violations, and the supposed uncertainty concerning the government's regulatory authority. The district court considered these arguments when setting the penalty (a penalty that was significantly lower than the statutory maximum). None of Tsakopoulos's arguments rises to the level necessary to demonstrate an abuse of discretion by the district court.

Conclusion

We affirm the district court's holding that deep ripping in this context is subject to the jurisdiction of the Corps and the EPA. We also affirm the district court's factual findings except with respect to the vernal pools. We remand for a recalculation of the civil penalties. Finally, we deny Tsakopoulos's request that this case be assigned to a different district judge on remand.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED. Costs on appeal to appellees.

RONALD M. GOULD, Circuit Judge, dissenting:

I respectfully dissent. The crux of this case is that a farmer[1] has plowed deeply to improve his farm property to permit farming of fruit crops that require deep root systems, and are more profitable than grazing or other prior farm use. Farmers have been altering and transforming their crop land from the beginning of our nation, and indeed in colonial times. Although I have no doubt that Congress could have reached and regulated the farming activity challenged, that does not in itself show that Congress so exercised its power. I conclude that the Clean Water Act does not prohibit "deep ripping" in this setting.

I would follow and extend *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C.Cir.1998), and hold that the return of soil in place after deep plowing is not a "discharge of a pollutant." In *National Mining*, the court held that the Corps exceeded its authority under section 404 of the Clean Water Act by

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[1] Appellant, Angelo Tsakopoulos, is referred to by the majority as a "real estate developer." As the owner of Borden Ranch, which apparently engaged in both farming and ranching activities, it seems to me correct to refer to him as a farmer or a rancher, in addition to being a developer. Whether viewed as a farmer, rancher, or developer, his rights as a citizen are the same. Because the challenged activities in this case arise on land previously used for rangeland for cattle grazing, and his deep ripping was converting the land for orchard and vineyard farming, I consider him as a farmer and rancher, and the issues raised by his position in this litigation may impact farmers and ranchers regardless of whether they plan to sell portions of improved land.

regulating the redeposit of dredged materials that incidentally fall back in the course of dredging operations. The court explained that "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." *Id.* at 1404. The court rejected the agencies' primary argument that incidental fallback constitutes an "addition" because once dredged the material becomes a pollutant:

> Regardless of any legal metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of dredged material when there is no addition of material. Although the Act includes "dredged spoil" in its list of pollutants, Congress could not have contemplated that the attempted removal of 100 tons of that substance could constitute an addition simply because only 99 tons of it were actually taken away.

Id. at 1404 (emphasis omitted).

Those considerations are persuasive here as deep ripping does not involve any significant removal or "addition" of material to the site. The ground is plowed and transformed. It is true that the hydrological regime is modified, but Congress spoke in terms of discharge or addition of pollutants, not in terms of change of the hydrological nature of the soil. If Congress intends to prohibit so natural a farm activity as plowing, and even the deep plowing that occurred here, Congress can and should be explicit. Although we interpret the prohibitions of the Clean Water Act to effectuate Congressional intent,

it is an undue stretch for us, absent a more clear directive from Congress, to reach and prohibit the plowing done here, which seems to be a traditional form of farming activity.

Rybachek v. United States Environmental Protection Agency, 904 F.2d 1276 (9th Cir.1990), in my view, is distinguishable. In *Rybachek*, we held that placer mining, "a process in which miners excavate dirt and gravel in and around waterways and, after extracting the gold, discharge the leftover material back into the water," fell within the scope of section 404 of the Clean Water Act. *Id.* at 1285. There, the *Rybachek* court identified the regulable discharge as the discrete act of dumping *leftover* material into the stream after it had been processed. *Id.* As the concurrence in *National Mining* makes clear, however, "the word addition carries both a temporal and geographic ambiguity. If the material that would otherwise fall back were moved some distance away and then dropped, it very well might constitute an 'addition.' Or if it were held for some time and then dropped back in the same spot, it might also constitute an 'addition.' " *National Mining*, 145 F.3d at 1410 (*Silberman*, J., concurring). Because deep ripping does not move any material to a substantially different geographic location and does not process such material for any period of time, *Rybachek* is not controlling.

Nor is the Fourth Circuit's opinion in *United States v. Deaton*, 209 F.3d 331 (4th Cir.2000), relied on by the majority, persuasive to me in the context presented. A farmer who plows deeply is not, in my view, redepositing dredged or excavated materials. While the Fourth Circuit relied on the fact that a "dredged spoil" is a statutory

pollutant, the deep plowing activity here, in my view, is not the same as dredging dirt from and redepositing it in waters.

Also, even assuming that deep ripping can be viewed as a discharge of a pollutant into navigable waters, it seems at first consideration exempt as a normal farming activity. The Clean Water Act exempts normal farming activity, including plowing. *See* 33 U.S.C. § 1344(f)(1)(A). The exemption as cast by Congress is not limited to shallow plowing, but would appear literally to cover the deep plowing technique referred to as deep ripping.

This exemption, however, does not apply by its terms to "any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject." *See* 33 U.S.C. § 1344(f)(2). Moreover, the Corps of Engineers, by regulation, has provided explicitly that the plowing exemption does not include "redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land." 33 C.F.R. § 323.4(a)(1)(iii)(D). The Corp's regulation, which we upheld in *United States v. Akers*, 785 F.2d 814, 819-20 (9th Cir.1986), must be read consistent with the statute's terms. Although this limitation defeats the exemption for any deep ripping that had the purpose of transforming land, it does not, in my view, defeat the exemption as to any *unintended* impairment. Most violations found by the district court involved a purposeful attempt to transform the land. But some of the transgressions (indentations in swales caused by moving the deep ripper to different locations) found by the district court here were apparently unintentional, or at least there was no finding by

the district court of purposeful modification as to all of the violations.

I would hold that the district court erred in finding that the activities here required a permit and otherwise violated the Clean Water Act. The problem of interpretation here arises because Congress prohibited the discharge or addition of any pollutant to navigable waters from any point source. It did not literally prohibit any conduct by farmers or ranchers that changes the hydrological character of their land. The majority opinion, motivated perhaps by the purposes of the statute, makes new law by concluding that a plow is a point source and that deep ripping includes discharge of pollutants into protected waters. The policy decision involved here should be made by Congress, which has the ability to study and the power to make such fine distinctions. I understand how the majority reaches its position based on *Rybachek*, and incremental judicial reasoning. Notwithstanding, the judicial determination that a deep plowing technique constitutes a pollution of navigable waters, with no prior adequate guidance from Congress, goes beyond mere statutory interpretation. It would be preferable for the public, the regulators, and us were Congress to speak explicitly on the subjects of what normal farming or ranching activities may include discharge of pollutants and require permits under the Clean Water Act, and whether it wishes to exempt any such activities and upon what terms. The alternatives are an agency power too unbounded or judicial law-making, which is worse. I respectfully dissent.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BORDEN RANCH ASSOCIATES; ANGELO K. TSAKOPOULOS, Plaintiffs, v. U.S. ARMY CORPS OF ENGINEERS, an agency of the United States; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States, Defendants. AND RELATED CROSS-ACTION	Case No. CIV-S-97-858 GEB JFM (~~PROPOSED~~) JOINT STIPULATION AND PRELIMINARY INJUNCTION ORDER (Filed Oct. 20, 1997)

The United States of America, having filed a Counterclaim seeking injunctive relief and civil penalties under the Clean Water Act, and a Motion for Temporary Restraining Order and Preliminary Injunction against plaintiff and counterdefendant Angelo K. Tsakopoulos; the Court having on October 9, 1997, orally entered a Temporary Restraining Order against Tsakopoulos for, among other things, planned plowing and planting activities on already "deep-ripped" Borden Ranch parcels for land preparation and the planting of winter wheat and/or oat crops precluding any such activities from occurring within swales (or other jurisdictional waters of the United States) until a hearing on the United States' Motion for Preliminary Injunction could be had; Mr. Tsakopoulos having now determined, in light of the economics of the matter and the delay occasioned by the TRO, not to pursue said plowing operations in the swales; and Mr. Tsakopoulos accordingly having agreed to the entry of a preliminary injunction to preserve the status quo with respect to the Borden Ranch delineated waters and wetlands pending this Court's decision on the merits of this action,

IT IS HEREBY STIPULATED BY THE PARTIES AND ORDERED BY THE COURT that:

1. Pending the resolution of the parties' action, counterdefendant Angelo K. Tsakopoulos ("Tsakopoulos") shall not engage in any activities which the United States has contended result in the discharge of any dredged or fill material into those portions of Borden Ranch designated as waters of the United States by the jurisdictional delineation performed by Sugnet & Associates attached as Exhibit A hereto, except in those portions

of Borden Ranch where the discharge of dredged or fill materials has been authorized pursuant to a valid section 404 permit.

2. The prohibited activities in jurisdictional waters shall include, by way of example and not limitation, filling, dredging, deep plowing or deep ripping, discing, floating, levelling, grading, clearing land, and casting aside soil or other surface materials. This preliminary injunction does not enjoin Tsakopoulos from engaging in such activities *outside of* the delineated jurisdictional waters and wetlands. The United States reserves the right to take appropriate enforcement action against Mr. Tsakopoulos if such activities are in violation of other applicable laws and regulations.

3. Employees and authorized representatives (including contractors) of the United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers (the "Corps") shall be permitted reasonable entry into that certain property owned by Tsakopoulos and more particularly identified in Exhibit "D" to Tsakopoulos' Complaint for Declaratory and Injunctive Relief in this action ("Borden Ranch"), upon reasonable written notice to Tsakopoulos of not less than 48 hours, for the purpose of monitoring compliance with this Order. As part of monitoring compliance, EPA or the Corps may take samples, measurements, photographs, and videotapes or otherwise record or document information regarding compliance with this Order. Any party to this Order may ask the Court to resolve any disputes regarding the reasonableness of notice or entry, or regarding compliance with this paragraph.

4. Tsakopoulos, his agents, servants, employees and assigns, and all persons in active concert or participation with them shall not unreasonably interfere in any manner with the implementation of this Order. Mr. Tsakopoulos reserves the right to file a motion with the Court for modification or dissolution of this Order at any time.

5. This Order shall be binding on Tsakopoulos, his agents, servants, employees and assigns, and all persons in active concert or participation with them. By stipulating to this Order, Mr. Tsakopoulos merely agrees to preserve the status quo as set forth herein, and makes no concession or admission as to the facts, theories or merits of this action.

IT IS SO STIPULATED.

Dated: 10/15, 1997

MILLER, STARR & REGALIA

By: /s/ Arthur F. Coon
Arthur F. Coon
Attorneys for Plaintiffs
BORDEN RANCH ASSOCIATES and ANGELO K. TSAKOPOULOS

Dated: October 15, 1997

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

By: /s/ Sylvia Quast
Sylvia Quast
Attorneys for Defendants and Counterclaimant

IT IS SO ORDERED.

Dated: October 20, 1997

/s/ Garland E. Burrell, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BORDEN RANCH PARTNERSHIP; ANGELO K. TSAKOPOULOS, Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, an Agency of the United States; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an Agency of the United States Defendants. AND RELATED CROSS-ACTION.	CIV-S-97-0858 GEB JFM AMENDED ORDER* (Filed Aug. 3, 1998)

Pending are the parties' cross-motion for summary judgment on Plaintiffs' challenge to Defendants' application of the Clean Water Act ("CWA" or "Act") to activities that Plaintiffs claim are not subject to regulation. For the reasons stated below, Plaintiffs' motion is denied and Defendants' motion is granted in part.

* Because text was inadvertently omitted from the order filed June 9, 1998, this amended order is hereby filed.

I.
BACKGROUND

Section 404 of the CWA[1] establishes a permit program to control the discharge of dredged and fill material. *See* 33 U.S.C. § 1344. Section 301 prohibits discharge of any pollutant without a permit into navigable waters of the United States. *See id.* at § 1311. Unpermitted discharges of dredged or fill material or pollutant may be enforced pursuant to section 309. *See id.* at § 1319.

Congress delegated Defendant United States Army Corps of Engineers ("Corps") the authority to issue section 404 permits. *See* 33 U.S.C. §§ 1344(a), 1344(d). While the Corps retains enforcement authority over permit conditions and limitations, Defendant Environmental Protection Agency ("EPA") has direct enforcement authority over unpermitted discharges in violation of section 301. *See* 33 U.S.C. §§ 1319, 1344. Both agencies are empowered to issue regulations and guidance documents and thus share in the administration of the Act. *See, e.g.*, 33 U.S.C. § 1344(b)(1).

At issue is whether Plaintiffs Borden Ranch Partnership and Angelo K. Tsakopoulos are required to obtain section 404 permits from the Corps before engaging in certain activities in "waters of the United States" on Borden Ranch. Plaintiffs argue they are entitled to plow these "waters" to plant orchards, vineyards, and other deep-root crops without obtaining a permit. They further contend that their deep slip plowing ("deep ripping")

[1] Unless otherwise indicated, all references to code sections pertain to the CWA.

and shallow plowing ("disking") in areas of normally dry but seasonally inundated "wetlands" constitute "normal" plowing and farming activities, which are specifically exempt from the permit requirements. Accordingly, Plaintiffs allege that Defendants have exceeded their delegated authority by arbitrarily and capriciously preparing and applying regulations to Plaintiffs' activities.[2] Defendants rejoin that Plaintiffs' deep ripping and disking activities are not exempt from section 404 permit requirements and that Plaintiffs have violated the CWA by placing fill, which alternatively constitutes pollutant, in protected waters without a permit. Defendants additionally argue that Plaintiffs' facial challenges to defendants' regulations are time-barred and that both Plaintiffs' due process and

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[2] In the Complaint, Plaintiffs pray for declaratory and injunctive relief from application of both Defendants' regulations and a Regulatory Guidance Letter ("RGL") issued by the Corps on December 12, 1996. *See* Compl. at 29-30. However, based on the factual record presented on the cross motions for summary judgment, it is unclear whether the RGL has actually been applied to Plaintiffs. Therefore, decision is reached without reference to it.

Furthermore, the ripeness of Plaintiffs' challenge to the RGL has not been established. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 1998 WL 244192, at *5 (U.S. May 18, 1998). Therefore, any dispute regarding the RGL has not been shown to be justiciable. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967) (explaining that the ripeness requirement was designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties").

commerce clause challenges to the regulations lack merit.[3]

II.

ANALYSIS

A. Standard of Review

Summary judgment is appropriate where the record shows an absence of a genuine issue of material fact entitling the movant to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The movant has the initial burden of establishing the absence of genuine issues of material fact. Fed. R. Civ. P. 56(c). Once the movant has met its burden, the nonmovant must make a sufficient showing on matters on which it will have the burden of going forward with evidence at trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). "The inquiry involved in ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Thus, "[o]n cross motions for summary judgment, the burdens faced by the opposing parties vary with the burden of proof they will face at trial." *Cabo Distributing Co., Inc. v. Brady*, 821 F. Supp. 601, 607 (N.D. Cal. 1992).

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[3] Pacific Legal Foundation, California Farm Bureau Federation, and California Cattlemen's Association (collectively "PCC") and California Mining Association ("CMA") each filed amicus curiae briefs in support of Plaintiffs' motion for summary judgment. Both PCC and CMA principally contest Defendants' jurisdiction over "wetlands" on Borden Ranch.

When cross motions for summary judgment are filed, the ordinary implication is that no disputed issues of material fact exist and that the dispute may be decided as a matter of law. *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1417, n.1 (9th Cir. 1986). Nevertheless, the Court must determine whether the parties have raised issues of material fact that make summary judgment inappropriate. *Id.*

> A "material" fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.

T.W. Electrical Service, Inc. v. Pacific Electrical Contractors, Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

Neither party seriously disputes the facts giving rise to the issues in suit. Instead, the parties disagree over the requirements of the CWA, and whether Plaintiffs' activities fall within the CWA's proscriptions. The motions thus require construction of the Act in light of the undisputed facts.

B. Section 301 Violation

To establish that Plaintiffs violated section 301 of the CWA, Defendants must show "(a) that [they have] jurisdiction over the subject waters, (b) that the [Plaintiffs] discharged or placed fill [or pollutant] in those waters, and (c) that the [Plaintiffs] did so without a permit from

the Corps." *United States v. Zanger*, 767 F. Supp. 1030, 1033 (N.D. Cal. 1991).

1. Jurisdiction over the Subject Waters

The Corps' section 404 jurisdiction over "waters of United States" includes navigable waters; interstate waters and wetlands; all other waters, the use, degradation, or destruction of which could affect interstate or foreign commerce;[4] tributaries of all above waters; and wetlands adjacent to such waters. *See* 33 C.F.R. § 328.3; 40 C.F.R. § 232.2. *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985) (approving the Corps' interpretation of its CWA jurisdiction to include wetlands adjacent to navigable waterways). Borden Ranch supports primarily three types of waters of the United States: vernal pools, sloped wetlands (also known as swales), and intermittent drainages. *See* Undisputed Material Fact ("UMF") 45. Some intermittent streams on Borden Ranch are tributaries to tributaries of the Sacramento River, a water used in interstate commerce. *Id.* at 48-49.

Plaintiffs "do not dispute the accuracy of [the Corps'] delineation of areas on Borden Ranch as wetlands" for the purposes of their motion. Pls.' Mem. Supp. Mot. Summ. J. at 1, n.1. Therefore, Defendants' jurisdiction over the subject waters is not at issue. However, the

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[4] "Other waters" includes "intrastate lakes, river, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, wet meadows, playa lakes, or natural ponds." 33 C.F.R. § 328.3(a)(3); 40 C.F.R. § 232.2.

parties vigorously dispute whether Plaintiffs' deep ripping and disking activities cause "discharge of any pollutant" or "dredged or fill material into the navigable waters," which requires a permit. *See* 33 U.S.C. §§ 1311, 1344.

2. Discharge of Dredged or Fill Material and Addition of a Pollutant from a Point Source

Under the CWA, "dredged material" is defined as "material that is excavated or dredged from the waters of the United States." 33 C.F.R. § 323.2(c); 40 C.F.R. § 232.2. "Fill material" is "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body." 33 C.F.R. § 323.2(e); *see also* 40 C.F.R. § 232.2 (defining "fill material" as "any pollutant which replaces portions of the waters of the United States with dry land or which changes the bottom elevation of a water body for any purpose"). The definition of "pollutant" includes "dredged spoil,. . . . rock, sand, cellar dirt, . . . and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

"Discharge of dredged material" means "any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States."[5] 33 C.F.R. § 323.2(d); 40 C.F.R. § 232.2. "Discharge

[5] Section 404 authorization is not required for "any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading the waters of the United States." 33 C.F.R. § 323.2(d)(3)(i); *see also* 40 C.F.R. § 232.2. An activity associated with the discharge of dredged material destroys the waters of the United States "if it alters the area in such a way that it would no longer be a water of the United States." 33 C.F.R. § 323.2(d)(4); 40 C.F.R. § 232.2. An activity associated with the discharge of dredged material degrades the waters of the United States "if it has more than a de minimis (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative effect on any aquatic function." 33 C.F.R. § 323.2(d)(5); 40 C.F.R. § 232.2.

of fill material" is "the addition of fill material into waters of the United States."[6] 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2. "Discharge of a pollutant" is "any addition of any pollutant to navigable waters form any point source." 33 U.S.C. § 1362(12).

Here, the only question is whether Plaintiffs' deep ripping and disking activities are subject to section 404 permit requirements. UMF 31-33, 35-36. The answer depends upon whether or not deep ripping and/or disking cause "discharge" of "fill or dredged material" or "pollutant from a point source" into protected waters. Deep ripping is a type or technique of plowing used by farmers throughout the nation in preparation for the planting of deep-root crops that require water to penetrate down into the root zone. UMF 36, 59. It is achieved by running a four- to seven-foot deep plow through the land to break up compacted soils in order to allow percolation of water deeper into the soil. *Id.* at 31, 58. Disking

[6] With reference ot 33 C.F.R. § 323.4, which defines activities exempt from permit requirements, "[t]he term ["discharge of fill material"] does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products." 33 C.F.R. § 323.2(f).

penetrates approximately twelve inches into the soil. *Id.* at 32. Deep ripping and disking break up, mix, homogenize, loosen, aerate, and horizontally move soil. *Id.* at 33, 60. Plaintiffs use rippers, disks, and rollers attached to tractors and bulldozers with blades raised to pull plows through the soil on Borden Ranch, breaking up, mixing, and turning over material already in the pools, swales, and intermittent streams. *Id.* at 38, 62.

Plaintiffs argue that deep ripping and disking do not produce "fill" since nothing is added to the soil as a pollutant and any earth that is disturbed already exists on the site. Pls.' Mem. Supp. Mot. Summ. J. at 37-38. However, redeposit of earth can constitute "addition of a pollutant." *See Rybachek v. EPA*, 904 F.2d 1276, 1285-86 (9th Cir. 1990) (stating that "even if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the Act" and " 'the word "addition," as used in the definition of "discharge," may reasonably be understood to include "redeposit" ' ") (quoting *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983)); *In re Alameda County Assessor's Parcel No. 537-801-2-4*, 672 F. Supp. 1278, 1284-85 (N.D. Cal. 1987) (stating that fill dirt is a pollutant). Earth can also constitute "dredged or fill material" where it causes or contributes to degradation or destruction of the "waters." *See Avoyelles*, 715 F.2d at 923 ("If vegetation or other materials are redeposited in the wetland, that activity is a discharge"); *United States v. Tilton*, 705 F.2d 429, 430 (11th Cir. 1983) (enjoining unpermitted discharge of fill material "consisting of woodchips, pine bark, and soil"); *United States v. Sinclair Oil Co.*, 767 F.Supp 200, 204 (D. Mont. 1990) ("the regulation does not distinguish between indigenous material and foreign materials").

Plaintiffs attempt to distinguish their activities from those requiring a section 404 permit. First, Plaintiffs argue that their primary purpose for deep ripping and disking is not to fill wetlands but to enhance the soil's agricultural viability. Pls.' Mem. Supp. Mot. Summ. J. at 36. However, the purpose for which a discharge is made is irrelevant to the determination of whether addition of a particular substance is a "discharge" under the Act. *See Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 627 (8th Cir. 1978) (finding "no justification in the Act for the District Court's determination that whether the discharge of a particular substance . . . constitutes a discharge of a 'pollutant' depends upon the purpose for which the discharge is made"); 40 C.F.R. § 232.2 (defining "fill material" as "any pollutant which replaces portions of the waters of the United States with dry land or which changes the bottom elevation of a water body for any purpose"); *see also United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (stating that liability under the CWA is strict). Second, Plaintiffs argue that deep ripping and disking move soil no more than a "de minimis" horizontal distance and, third, that the "fallback" of soil from a plow is analogous to unregulated "incidental fallback" that attends mechanized dredging operations. Pls.' Mem. Supp. Mot. Summ. J. at 18-21, 37, 38; Pls.' Reply Mem. at 21. Neither of these arguments, however, is relevant to the determination of whether Plaintiffs' activities come within section 404 permit requirements.[7]

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[7] Plaintiffs' reliance on the district court's invalidation of the *Tulloch* Rule in *American Mining Congress v. United States*

See Minnehaha, 597 F.2d at 626-27 (rejecting district court's conclusion that "significant alteration in water quality must be demonstrated before discharge of a particular substance to navigable waters can be classified as the discharge of a pollutant").

In fact, Plaintiffs concede that what they have characterized as "mistaken" deep ripping and disking of admitted wetlands and other waters resulted in those waters' losing the ability to hold and convey water. *See* UMF 78-79. This conversion of wetlands and other waters to dry land alone proves that Plaintiffs' plowing activities,

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Army Corps of Engineers, 951 F.Supp. 267, 272 (D.D.C. 1997), which is currently pending on appeal, is unavailing. Prior to the *Tulloch* Rule, "the agencies did not regulate under § 404 excavation activities that involved the removal of materials from waters, such as landclearing, ditching, and channelization, even if those activities might have adversely impacted wetlands or waters." *American Mining Congress*, 951 F. Supp. at 269. Under the *Tullock* Rule, however, the agencies regulate removal activities "because they consider the 'incidental fallback' that accompanies *dredging* to be a 'discharge' under § 404." *Id.* The *Tulloch* Rule applies only to dredging activities. *See id.* Plaintiffs argue that their activities are limited to plowing land "in its natural state and condition" and that the CWA does not apply to their activities in the first instance. *See* Johas Decl. ¶ 12; Compl. ¶ 7. Contrary to Plaintiffs' argument, *American Mining Congress* does not apply to this case. That decision dealt with excavation and mechanized landclearing and "de minimis (i.e., inconsequential) effect" and "incidental addition, including redeposit," concepts relevant only to dredging activities under the Act. *See* 33 C.F.R. §§ 323.2(d)(3)(i), 323.2(d)(5); 40 C.F.R. § 232.2. These concepts are not part of the provisions governing "discharge of fill material" or "addition of pollutants" at issue here. *See* 33 U.S.C. § 1362(6), 33 C.F.R. § 323.2(e); 40 C.F.R. § 232.2.

without more, can cause the discharge of fill material, which, in turn, causes the destruction of waters.[8]

Plaintiffs argue that plows cannot be characterized as point sources.[9] *See* Pls.' Reply Mem. at 10-11. The CWA neither explicitly excludes nor includes plows from the definition of "point source."[10] *See* 33 U.S.C. § 1362(14).

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[8] Plaintiffs object strenuously to defense expert Lyndon Lee's descriptions of deep ripping and disking on Borden Ranch. *See* Pls.' Reply Mem. at 19-27. Plaintiffs' concern over Dr. Lee's alleged failure to describe soil movement "for any significant distance," however, is misplaced. *See id.* at 20. Nothing in the CWA suggests that a quantitative minimum of a particular substance's movement is determinative of its classification as fill. *See Minnehaha*, 597 F.2d at 627. The CWA "was intended to control the degradation of aquatic resources that results from *any* replacement of water with fill material, as well as the degradation that results from the discharge of dredged or fill material. . . . " *Id.* (emphasis added). Furthermore, that earth can constitute "fill material" or "pollutant" within the meaning of the Act can be decided without reliance on Dr. Lee's declaration since Plaintiffs' prior plowing activities alone prove that fact. *See* UMF 78-79. Accordingly, Plaintiffs' specific objections to Dr. Lee's declaration need not be addressed.

[9] Plaintiffs correctly state that a pollutant can only be discharged from a point source. *See* 33 U.S.C. § 1362(12) (defining "discharge of pollutant" as "any addition of any pollutant to navigable waters from a point source"). Although plows can constitute point sources, Plaintiffs' liability under section 404 is alternatively established without reference to point sources by the fact that their plowing activities can cause discharge of fill material.

[10] "Point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other

However, where discharges of substances have threatened protected waters, even items such as backhoes and bulldozers have been found to be "point sources." *Avoyelles*, 715 F.2d at 929. *See also Alameda County Assessor's Parcel*, 671 F. Supp. at 1284-85 ("In situations where an individual has been unlawfully dumping fill dirt on wetlands, the courts have consistently found that dump trucks, trailer trucks, bulldozers, and earth graders all qualify as 'point sources' for purposes of the CWA"). Accordingly, "the definition of a point source is to be broadly interpreted" to encompass conveyances from which pollutants might enter waters of the United States. *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994). Under this definition, Plaintiffs' plows could be "point sources."

3. The Requirement of a Section 404 Permit

Having established that Plaintiffs could have "discharged" "fill material" or "pollutant from a point source" into "waters of the United States" by engaging in deep ripping and disking activities, the remaining question is whether Plaintiffs did so without a section 404 permit. Plaintiffs admit that "there are approximately 9.99 acres of delineated wetlands/waters on the Borden Ranch parcels where [such] plowing activities have occurred" without a section 404 permit. *See* Whitney Reply Decl. ¶ 8; UMF 27; Coe Decl. ¶ 21, Exh. 8; Joint Stip. & Prelim. Inj. Order filed 10/20/97 at 2.

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floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Thus, the "point source" concept incorporates both physical and functional characteristics.

Since such activities may cause discharge of fill material or pollutant into waters of the United States, they may not occur prior to completion of the section 404 permit process. *Cf. Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72-73 (3rd Cir. 1990) (stating that a CWA enforcement action only requires showing that the offending discharge "may" cause the alleged adverse effects). Therefore, Defendants' request for declaratory judgment that Plaintiffs' deep ripping and disking violate section 301 is granted. The existence of disputed facts, however, prevents summary adjudication of whether Plaintiffs' activities *actually* constitute a CWA violation.[11]

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[11] Although Defendants' Cross complaint prays for other forms of relief, including assessment of civil penalties for CWA violations, their motion failed to place these requests at issue. Furthermore, the existence of disputed facts concerning both the extent and the effects of particular instances of Plaintiffs' unpermitted deep ripping and disking activities on Borden Ranch precludes assessment of any particular section 301 violation on summary judgment.

It should be noted that while Plaintiffs applied for a section 404 permit in February 1997 "for the balance of the Borden Ranch owned by them," Defendants ceased processing the permit application. *See* UMF 26-27. Thus, this case comes before the Court unaccompanied by the Corps' decision on Plaintiffs' application for a permit. Consequently, the Court lacks the benefit of the agency's findings on the same issues raised by this lawsuit. In *Avoyelles*, the Fifth Circuit discussed the benefit of establishing an administrative record in advance of seeking judicial review where, as here, "[t]he question . . . is the extent, not the existence, of agency jurisdiction":

> Basically speaking, since [defining wetlands] is a responsibility which Congress has designated the Corps and two other Government agencies to

C. Normal Farming Exemption

Next, Plaintiffs argue that they are exempt from the permit requirement. Indeed, section 404 exempts certain activities from coverage. *See* 33 U.S.C. § 1344(f). "[N]ormal farming, silvicultural, and ranching activities" are generally exempted from permit requirements, and "plowing"[12] is specifically exempted. *Id.*; 33 C.F.R.

> accomplish, it is their primary responsibility and they have the expertise to handle the question. And since in just about all cases that the Court has come into contact with, these cases have been cases in which the court has the benefit of the consideration given by the agencies and is not called upon to be the agency of first impression, or to use its own initiative in making a definition or enforcing it. It has been asked to review a definition made by persons who are experts in that field and have accumulated expert testimony. . . . [T]he Court ordinarily has the benefit of this consideration. And I feel that the Court in this instance should also have the benefit of this consideration, if it is possible to do so.

Avoyelles, 715 F.2d at 904 (quoting Prel. Inj. Hr'g tr.). *See also infra*, note 17.

[12] "Plowing" is

> all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading,

grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

33 C.F.R. § 323.4(a)(1)(iii); 40 C.F.R. § 232.3(d)(4). Plaintiffs' activities that cause "redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land" do not fall within the definition of exempted "plowing."

§ 323.4; 40 C.F.R. § 232.3. However, to fall within the statutory exemptions, an activity must be part of an "established (i.e., on-going) farming, silviculture, or ranching operation." 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.2(c)(1)(ii)(A); *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986). The exemption is not available either (1) for "[a]ctivities which bring an area into farming . . . use" or (2) where "modifications to the hydrological regime are necessary to resume operations." 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.3(c)(1)(ii)(B); *United States v. Brace*, 41 F.3d 117, 123 (3rd. Cir. 1994). Plaintiffs bear the burden of demonstrating that their activities are exempt from the section 404 permit requirements of the CWA. *Akers*, 785 F.2d at 819.

Plaintiffs fail to show that their activities qualify for an exemption.[13] Plaintiffs' exemption argument that

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[13] Plaintiffs argue that "Defendants' construction of 'normal' to mean 'established and ongoing' renders section 404(f)(1)(A) a mere 'grandfather clause' in direct contravention of Congress' intent." Pls.' Reply Mem. at 28. To the contrary, the requirement that "normal" farming activities be "established

Borden Ranch has historically been farmed and ranched and that their specific activities comport with traditional farming activities is similar to the argument rejected by the Ninth Circuit in *Akers*. *See* Pls.' Mem. Supp. Summ. J. at 41; *cf. Akers*, 785 F.2d at 819 (claiming entitlement to exemption on the bases of historic farming of land and undertaking of traditional farming activities). Specifically, the *Akers* court found that (1) upland crop production had not occurred on Akers' wetlands on a regular basis and (2), by his own admission, Akers' activities required "hydrological alteration" to the land. *Id.* at 819-20. In the instant case, while portions of Borden Ranch have been used for vineyards and orchards since 1993, the ranch has primarily been used as rangeland for the grazing of cattle. *See* UMF 3, 56. Although portions of Borden Ranch have also been used for the production of wheat, beets, tomatoes, beans, and corn since approximately 1940, upland crop production has not occurred on a regular basis. *Id.*; *cf. United States v. Larkins*, 657 F. Supp. 76, 85-86, n.23 ("even if the wetland had a history of farm use, that use was no longer established at the time of [Plaintiffs' activities]"). In fact, Plaintiffs admit that the land must be deep ripped and disked before it will be suitable for planting vineyards and orchards which "require water to penetrate down into the root zone." *See* UMF 58-59; *cf. Brace*, 41 F.3d at 125 (stating that "activities which bring an area into farming . . . use are not part of an established

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and ongoing" simply effects Congress' intent to exempt only those "narrowly defined activities that cause little or no adverse effects either individually or cumulatively." *Akers*, 785 F.2d at 819 (quoting 3 Leg. Hist. of the CWA of 1977 at 474 (Sen. Muskie)).

operation"). In other words, even if the subject wetlands and other waters on Borden Ranch were previously farmed, "modifications to the hydrological regime are necessary" to enable Plaintiffs to now plant orchards and vineyards. This evinces that Plaintiffs' activities are not part of an established farming operation.

Plaintiffs also rely on the definition of "normal" in Webster's Dictionary and the definition of "wetlands" in the Federal Agriculture Improvement and Reform Act to preclude inquiry into whether their activities are established and ongoing. *See* Pls.' Mem. Supp. Summ. J. at 11, n.4, 15, 35; Pls.' Reply Mem. at 29. However, "the proper question is whether the activities performed by [Plaintiffs] at this particular site, and at a time when the CWA applied, were within the meaning of the statutory term 'normal farming activities' as defined by the regulations." *Brace*, 41 F.3d at 127. Furthermore, courts must defer to "[a]n agency's construction of a statute it is charged with enforcing . . . if it is reasonable and not in conflict with the expressed intent of Congress." *Riverside Bayview Homes*, 474 U.S. at 131. Courts must "especially defer where the Agency's decision on the meaning or reach of the Clean Water Act involves reconciling conflicting policies committed to the Agency's care and expertise under the Act." *Rybachek*, 904 F.2d at 1284.

The intent of Congress in passing the CWA was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *Riverside Bayview Homes*, 474 U.S. at 132. To effectuate this goal, Congress implemented the permit programs, which are "the central enforcement tool[s] of the Clean Water

Act," *Brace*, 41 F.3d at 123, and delegated broad regulatory authority to the Corps and EPA under the Act, *see, e.g.*, 33 U.S.C. § 1311.

Given Congress' dual objectives of comprehensively protecting waters of the United States and shielding certain, narrowly defined activities from regulation, the agencies' regulations are reasonable.[14] *See Riverside Bayview Homes*, 474 U.S. at 131 (limiting review of agency's construction of statute to "the question whether it is reasonable, in light of the language, policies, and legislative history of the Act"); *see also United States v. Huebner*, 752 F.2d 1235, 1240 (7th Cir. 1985) ("It is clear that the amendments that created the subsection (f) exceptions . . . were not intended to exempt all farming operations from the permit requirements"). Plaintiffs' activities must thus be examined in light of Defendants' regulations.

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[14] The Legislative History of the Act shows the intended breadth of its coverage:

> There is a national and Federal interest in waterways other than those on which a ship can be floated. . . . The Congress can abandon the national interest. The Congress can permit activities of a dredge-and-fill nature to go forward on those small streams, marshes, wetlands, and swamps which will make their way into the bigger waterways of this country and have a tremendous effect on the people of this country and on their welfare, on their crops, on many of their activities. Or we can establish a program of the sort the committee has established, which will protect all of those water systems, which will protect all of the elements of those systems. . . .

3 Legis. Hist. of the CWA of 1977 at 908 (Sen. Hart).

Because Plaintiffs' activities are not part of an ongoing farming operation, they are not exempt from section 404 permit requirements. Partial summary judgment is accordingly granted in Defendants' favor on the non-exempt status of Plaintiffs' deep ripping and disking activities that are not part of an established farming operation.

D. Recapture Provision

An activity otherwise exempt from section 404 permit requirements may require a permit pursuant to the "recapture provision." *See* 33 U.S.C. § 1344(f)(2); *Akers*, 785 F.2d at 822. Under the "recapture" provision "[a]ny discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area into a use which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced, shall be required to have a permit." 33 U.S.C. § 1344(f)(2). Plaintiffs bear the burden of demonstrating that their activities are not "recaptured" and thus regulated under 33 U.S.C. § 1344(f)(2). *Akers*, 785 F.2d at 819.

Plaintiffs seek to convert use of their land from ranching and grazing cattle to growing vineyards and orchards.[15] *See* UMF 56. *Cf. Akers*, 785 F.2d at 822-23

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[15] Plaintiffs argue that the recapture provision is limited to "extraorindary wetlands conversion activities." Pls.' Reply Mem. at 32-33. Nothing in the CWA, however, restricts. application of the recapture provision exclusively to "extraordinary wetlands conversion activities." *See Akers*, 785 F.2d at 822 (indicating that "the proper inquiry is not what could

(stating that recapture provision applies where activities "change a wetland's hydrological regime"); *accord Brace*, 41 F.3d at 129. Plaintiffs' plowing of other waters of the United States for these purposes has impaired "the flow or circulation of navigable waters" and reduced "the reach of such waters," thereby causing those waters to cease to exist. *See* UMF 78-79. This is revealing evidence of the effect Plaintiffs' deep ripping and/or disking activities may have on other waters of the United States. Thus, regardless of whether Plaintiffs' plowing activities qualify for an exemption under subsection 404(f)(1), they would require a permit under subsection 404(f)(2).[16] "Giving the recapture provision the appropriate common sense reading," Defendants are entitled to declaratory judgment that Plaintiffs' deep ripping and disking of wetlands and other federal waters "are not exempt from

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have been done but what *was* done in the past . . . ") (emphasis added).

[16] Plaintiffs argue that "Defendants' interpretation of section 404(f)(2)'s recapture provision would entirely swallow the section 404(f)(1)(A) 'Farmer Exemptions.' " Pls.' Reply Mem. at 28. However, reinstating the permit requirement (via section 404(f)(2)) for activities that would otherwise be exempt but for change in use of the land reflects Congress' intent to allow exemption for activities only to the extent that they do not degrade or destroy federal waters. The exemptions are confined to certain, narrowly defined activities and do not work as a wholesale exemption for all activities falling within certain types of uses. *See Akers*, 785 F.2d at 822 (rejecting attempt to distinguish "change *within* the farming use" from "change in use" denoting a "major *type* of use") (emphasis added); *see generally* 40 C.F.R. § 230.1 (outlining policies underlying section 404 permit requirements).

permit requirements due to the likely drying effect"[17] on waters of the United States. *Akers*, 785 F.2d at 822-23.

E. Plaintiffs' Challenges to Defendants' Regulations and Exercise of Jurisdiction

Plaintiffs also argue that Defendants' regulations are invalid because they are arbitrary and capricious and contravene legislative intent. Further, Plaintiffs contend that Defendants' asserted basis for exercising jurisdiction is unavailing. Plaintiffs rely on the arbitrary and capricious standard because the CWA does not set forth standards for reviewing the Corps' or EPA's decisions, and courts look for guidance to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. *See American Mining Congress v. EPA*, 965 F.2d 759, 763-64 (9th Cir. 1992). The APA generally provides that a court shall set aside agency findings, conclusions, and actions that are "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law," or that fail to meet procedural, statutory, or constitutional requirements. 5 U.S.C. §§ 706(2)(A), (B), (C), (D).

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[17] This ruling merely requires Plaintiffs to exhaust the section 404 permit procedure in advance of engaging in non-exempt or "recaptured" activities. It does not decide the propriety of granting or denying a permit. This is "precisely the type of agency decision that is normally subject to limited judicial review." *Avoyelles*, 715 F.2d at 906. As observed *supra*, note 11, since this litigation preceded completion of the permitting process, the Court was deprived of the benefit of a developed agency factual record on matters at issue. *See Ohio Forestry Ass'n*, 1998 WL 244192, at *5.

1. Facial Challenge to Validity

Pursuant to the APA, Plaintiffs challenge the "facial validity" of Defendants' regulations interpreting plowing and "other normal farming activities as resulting in the 'discharge of dredged or fill material.' "[18] Compl. ¶¶ 31-33. Actions brought pursuant to the APA are governed by a six-year statute of limitations. 28 U.S.C. § 2401(a); *Sierra Club v. Penfold*, 857 F.2d 1307, 1316 (9th Cir. 1988). The six-year statute of limitations on facial challenges to agency regulations commences on the date the regulations are published in the Federal Register. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991). Because Plaintiffs' Complaint, which was filed in May 1997, contests regulations that were published in November 1986, all facial challenges to the validity of the regulations are time-barred and accordingly dismissed.[19]

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[18] Although a "facial validity" challenge is alleged in Count I of the Complaint, any as-applied challenge to the regulations that might also include a challenge to the application of the RGL is not ripe. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (stating that "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him"); *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1324 (9th Cir. 1992) (withholding judicial review where the EPA and Corps had adopted a memorandum of agreement but had not yet applied it to a specific permit); *see also supra*, note 2.

[19] Plaintiffs contend that Defendants waived the statute of limitations defense by failing to plead it in their Answer. Pls.' Reply Mem. at 37. Defendants, however, may raise a statute of limitations defense for the first time on a motion for summary judgment where no prejudice to Plaintiffs is shown. *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984). Plaintiffs have not shown prejudice.

2. Due Process Challenge

In Count V of the Complaint, Plaintiffs attack Defendants' regulations for vagueness.[20] Compl. ¶¶ 45-47. Plaintiffs' challenge fails because Plaintiffs had actual notice that their activities might be subject to regulation. *See, e.g.*, Tsakopoulos Decl. ¶¶ 3-5, Exh. D; Coe Decl. ¶ 15. Even absent actual notice, Plaintiffs' due process challenge would fail.[21] *See Maynard v. Cartwright*, 486 U.S.

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[20] Because final agency action is ordinarily prerequisite to bringing a challenge under the APA, whether the APA provides Plaintiffs with a cause of action to challenge the regulations on constitutional grounds is unclear. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review"); *Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, 112 F.3d 1283, 1287 (5th Cir. 1997) ("to challenge a regulation after the limitations period [on a facial challenge] has expired, provided the ground for that challenge is that the issuing agency exceeded its constitutional or statutory authority,. . . . the claimant must show some direct, final agency action involving the particular plaintiff within six years of filing suit"). However, since Plaintiffs' due process and commerce clause challenges fail on the merits, there is no need to determine the existence of final agency action here.

[21] Plaintiffs also allege that Defendants violated Plaintiffs' due process rights "by shifting the burden of proof concerning compliance with Section 404 to the regulated parties." Compl. ¶ 47. Defendants correctly respond that the burden of proof in the enforcement action remains with Defendants and Plaintiffs bear only the burden of establishing the applicability of any exemptions. Defs.' Mem. Supp. Cross-mot. Summ. J. at 45. *See Akers*, 785 F.2d at 819; *Zanger*, 767 F. Supp. at 1033.

356, 361 ("objections to vagueness under the Due Process Clause rest on lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk"); *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1994) (upholding CWA permit against vagueness challenge where terms have meaning in the context of EPA regulatory scheme). Therefore, summary adjudication on Plaintiffs' due process challenge to the regulations is granted in favor of Defendants.

3. Commerce Clause Challenge

Plaintiffs argue that the Corps' exercise of jurisdiction based on EPA guidelines, which were adopted by the Corps and are known as the migratory bird rule, exceeds Defendants' delegated commerce clause authority. Compl. ¶¶ 48-52. Plaintiffs specifically contest Defendants' exercise of jurisdiction over four isolated vernal pools on Borden Ranch that have been plowed. Pls' Reply Mem. at 47-50. The pertinent part of the guidelines at issue defines waters as having sufficient ties to interstate commerce as follows: "(a) [w]hich are or would be used as habitat by birds protected by the Migratory Bird Treaties; or (b) [w]hich are or would be used as habitat by other migratory birds which cross state lines; or (c) [w]hich are or would be used as habitat for endangered species."[22] Definition of Waters of the United States, 51 Fed. Red. [sic] 41,217 (1986). Therefore, the issue is

[22] Included in the Corps' definition of "waters of the United States" are "interstate waters and wetlands." 33 C.F.R. § 328.3(a)(2).

whether the commerce clause authorizes the federal government to exercise regulatory jurisdiction over isolated intrastate waters that may serve as habitat for migratory birds and endangered species.

In 1990, the Ninth Circuit decided this very issue, holding that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which *may* provide habitat to migratory birds and endangered species." *Leslie Salt Co. v. United States ("Leslie Salt II")*, 896 F.2d 354, 360 (9th Cir. 1990) (emphasis added).[23] But Plaintiffs suggest that the United States Supreme Court's ruling in *United States v. Lopez*, 514 U.S. 594 (1995), changed the law in this circuit.[24] Pls.' Reply Mem. at 48. Plaintiffs argue under *Lopez*

[23] The referenced waters were artificially created, seasonally wet, and non-adjacent to navigable waters. *See Leslie Salt II*, 896 F.2d at 359-60.

[24] Although Plaintiffs fail to address the entire *Leslie Salt* line of cases, Amici attempt to distinguish *Leslie Salt II* and *Leslie Salt III*. *See* PCC's Mem. Supp. Pls.' Mot. Summ. J. at 15 (stating that although the Ninth Circuit accepted the Corps' migratory bird argument, the court acknowledged that the Corps' jurisdiction depended upon "the property's specific connections to interstate commerce due to migratory bird use"); CMA's Mem. Supp. Pls.' Mot. Summ. J. at 9-10 (arguing that *Leslie Salt* is not controlling because *Leslie Salt III* "used the law of the case to blindly follow *Leslie Salt II*"). *Leslie Salt II's* holding, however, is not as limited as Amici suggest. *See Leslie Salt II*, 896 F.2d at 360 (holding that the commerce clause empowers the Corps' broad CWA jurisdiction). Furthermore, the commerce clause itself authorizes regulation of intrastate migratory bird habitats. *See Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979) (stating that "the underlying assumption that the

that Defendants must demonstrate that each subject isolated wetland on Borden Ranch "substantially affect[s] interstate commerce" before jurisdiction exists under the migratory bird rule. *Id.* One month after *Lopez* was decided, however, the Ninth Circuit affirmed its previous holding on the validity of the migratory bird rule. *Leslie Salt Co. v. United States ("Leslie Salt III")*, 55 F.3d 1388, 1392 (1995). Thus, in this Circuit, the migratory bird rule remains a valid application of Defendants' exercise of jurisdiction under Congress' commerce clause powers, provided that the waters in question *may* provide habitat to migratory birds and/or endangered species.[25]

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national commerce power does not reach migratory wildlife is clearly flawed").

Plaintiffs and Amici argue that *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), controls the question of whether the migratory bird rule is a valid application of Defendants' commerce clause power. *See* Pls.' Reply Mem. at 49; CMA's Mem. Supp. Pls.' Mot. Summ. J. at 7-9; PCC's Mem. Supp. Pls.' Mot. Summ. J. at 12-13. Although the Fourth Circuit invalidated the migratory bird rule on the ground that it exceeded the commerce clause power in *Wilson*, it also acknowledged that "the power of Congress to regulate the discharge of pollutants into at least some nonnavigable waters is indisputable, but the limits of this power are far from clear." *Wilson*, 133 F.3d at 256.

[25] The Ninth Circuit is not alone in approving the migratory bird rule as a valid application of commerce clause power. *See Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 260-61 (7th Cir. 1993) (stating that the EPA reasonably interpreted the regulation both in regard to extending its jurisdiction to waters with "potential rather than actual, minimal rather than substantial" connection to interstate commerce and in "allowing migratory birds to be that connection between a wetland and interstate commerce"); *United States v. Marsh*, 740 F.2d 799, 804 (10th Cir. 1984) (finding proper the Corps' exercise of

> The migratory bird rule certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason. In this case, there is no evidence of human contact with the seasonally ponded areas. The only humans that hunt or photograph the birds using these ponds apparently are doing so after they have reached other locations. Nevertheless, given the broad sweep of the Commerce Clause, the holding in Leslie Salt II cannot be considered clearly erroneous on this ground.

Leslie Salt III at 1396.

Because Borden Ranch is within the Pacific Flyway, an international migratory corridor for waterfowl and other migratory birds, UMF 54, isolated vernal pools located on Borden Ranch may serve as habitat for migratory birds. The Corps thus may have jurisdiction under the commerce clause. However, since the suitability of certain waters on Borden Ranch as habitat for either migratory birds or endangered species is in dispute, a genuine issue of material fact exists as to which waters may serve as habitat under the migratory bird rule.[26]

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jurisdiction over an intrastate lake that was "on the flyway of several species of migratory waterfowl which are protected under international treaties"); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 1998 WL 139523, at *5 (N.D. Ill. Mar. 25, 1998) (finding that the migratory bird rule remains valid after *Lopez* and "authorizes the federal government to regulate isolated intrastate waters that provide a habitat for migratory birds even if the particular birds on the site do not substantially affect interstate commerce").

[26] The parties dispute application of the migratory bird rule to Borden Ranch by arguing different positions on whether

Accordingly, this issue is remanded to the Corps for further consideration. *See Camp v. Pitts*, 411 U.S. 138, 143 (1973) (stating that if an agency decision is not sustainable on the basis of the administrative record, then "the matter should be remanded to [the agency] for further consideration"); *see also Avoyelles*, 715 F.2d at 906 (observing that "[d]e novo review would permit the courts to intrude into an area in which they have no particular competence").

III.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED in part and Plaintiffs' motion is DENIED. The issue under the migratory bird rule and Plaintiffs' pending permit application are remanded to the Corps for further consideration.

IT IS SO ORDERED.

Dated: July 30, 1998

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge

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requisite presence on Borden Ranch of either migratory birds or endangered species has been established to create federal jurisdiction over the waters in issue. *Cf. Leslie Salt II*, 896 F.2d at 360 (stating that jurisdiction extends to waters that "*may* provide habitat") (emphasis added); *Hoffman Homes*, 999 F.2d at 261 (stating that before CWA violation can be determined, subject water must be found to be "a suitable or potential habitat for migratory birds").

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BORDEN RANCH PARTNERSHIP; ANGELO K. TSAKOPOULOS, Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, an Agency of the United States; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an Agency of the United States Defendants. AND RELATED CROSS-ACTION.	CIV-S-97-0858 GEB JFM ORDER* (Filed Aug. 10, 1998)

Plaintiffs move for entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b)[1] and for certification of this Court's June 9, 1998, Order ("Order") for appeal pursuant to 28 U.S.C. § 1292(b). Defendants oppose the motion. For the reasons stated below, the motion is denied.

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* This case was determined to be suitable for decision without oral argument. L.R. 78-230(h).

[1] Unless otherwise noted, all references to Rules are to the Federal Rules of Civil Procedure.

A. Entry of Final Judgment

Plaintiffs seek entry of final judgment on their challenges to Defendants' regulatory jurisdiction under the Clean Water Act ("CWA") that were resolved by partial summary judgment. *See* Pls.' Mot. at 10-15. Defendants rejoin, arguing that entry of final judgment on adjudicated claims is inappropriate because the adjudicated claims are not separable from the unadjudicated counterclaim. *See* Defs.' Opp'n at 9.

To resolve a Rule 54(b) motion, "[a] district court must first determine that it is dealing with a final judgment . . . in the sense that it is a decision upon a cognizable claim for relief, and . . . an ultimate disposition of an individual claim entered in the course of a multiple claims action."[2] *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7 (1980) (internal quotation marks omitted). "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Partial summary judgments are generally not final orders within the meaning of Rule 54(b).

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[2] In pertinent part, Rule 54(b) states:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

St. Paul Fire & Marine Ins. Co., v. F. H., 55 F.3d 1420, 1425 (9th Cir. 1994).

In this case, the Order on the parties' cross-motions for summary judgment declared lawful Defendants' regulatory jurisdiction over Plaintiffs' deep ripping and disking activities. Thus, Plaintiffs' claims challenging Defendants' CWA jurisdiction were adjudicated on the merits, making them "final" within the meaning of Rule 59(b). *See Curtiss-Wright Corp.*, 446 U.S. at 7.

However, "the district court must go on to determine whether there is any just reason for delay" of the appeal of individual final judgments. *Id.* at 8. This requires considering "judicial administrative interests as well as the equities involved" because "[n]ot all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims." *Id.*

Plaintiffs argue that their "entire legal case challenging the [Corps'] jurisdiction under the CWA does not depend on disputed facts and has now been definitively resolved against plaintiffs by this Court." *See* Pls.' Mot. at 8, 11. To the contrary, Defendants' counterclaim for enforcement of the CWA is both legally and factually inseparable from the decided claims. Because the construction and interpretation of the CWA that determined Defendants' lawful regulatory jurisdiction over Plaintiffs' activities may bear directly upon whether Plaintiffs are, in fact, liable for violations of and penalties under the CWA, "it is not proper to direct entry of a separate judgment pursuant to Rule 54(b)." *Morrison-Knudsen Co., Inc. v. J.D. Archer*, 655 F.2d 962, 965-66 (9th Cir. 1981)

(finding error in district court's entry of separate judgments where counterclaim reserved for trial was factually and legally related to counterclaims adjudicated on summary judgment). "Judgment under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and overcrowding the appellate docket are outbalanced by the pressing needs of the litigants for an early and separate judgment as to some claims or parties." *Id; see also Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987) ("the solution for Rule 54(b) purposes lies in a more pragmatic approach focusing on severability and efficient judicial administration"). Here, awaiting final resolution of the case will not exact a "harsh and unjust result" sufficient to require the appellate court to "address legal or factual issues that are similar to those contained in the claims still pending before the trial court." *Morrison-Knudsen*, 655 F.2d at 965. For the stated reasons, Plaintiffs' motion for entry of final judgment is DENIED.

B. Certification for Appeal

Plaintiffs next argue that certification for appeal of the Order pursuant to 28 U.S.C. § 1292(b) is appropriate. See Pls.' Mot. at 15-19; Reply at 10-14. Defendants counter that the requirements of section 1292(b) are not met. *See* Defs.' Opp'n at 11-15.

"Section 1292(b) provides a mechanism by which litigants can bring an immediate appeal of a non-final order upon the consent of both the district court and the court

of appeals."[3] *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1025-26, *aff'd, Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983). The decision to certify an interlocutory appeal is within the sound discretion of the district court. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995). Three elements determine the appropriateness of section 1292(b) certification: (1) the order from which the appeal is taken must involve a controlling question of law; (2) there must be substantial grounds for a difference of opinion concerning the issue; and (3) an immediate appeal must "materially advance the ultimate termination of the litigation." *Id.* at 68.

The Order here involves controlling questions of law. "[A]ll that must be shown for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litigation*, 673 F.2d at 1026.

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[3] Section 1292(b) states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

If the Ninth Circuit does not recognize Defendants' exercise of jurisdiction, then the outcome of the litigation in this Court would be changed materially.[4] Thus, the first element of section 1292(b) is met.

The second element of section 1292(b), however, is not met. Plaintiffs argue that possible intra-circuit splits on the issue of whether it is legal for Defendants to regulate Plaintiffs, deep ripping and disking constitute substantial grounds for a difference of opinion regarding Defendants' CWA jurisdiction. First, Plaintiffs contend that the reasoning of the Court of Appeals for the District of Columbia in *National Mining Ass'n v. United States Army Corps of Engineers*, No. 97-5099, 1998 WL 321064, at *6 (D.C. Cir. June 19, 1998), extends beyond dredging and excludes regulation of "incidental fallback" resulting from other activities. *See* Pls.' Mot. at 16, Reply at 11-12. Plaintiffs also contend that Defendants' exercise of jurisdiction pursuant to the migratory bird rule is called into question by another possible intra-circuit split. In support of their position, Plaintiffs cite *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), which illustrates an interpretation of the migratory bird rule following *United States v. Lopez*,

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[4] The remaining issues decided by the order, which include dismissal of Plaintiffs' due process, facial, and as-applied challenges to CWA regulations and a December 12, 1996, Regulatory Guidance Letter issued by Defendant Army Corps of Engineers, are, collateral to Plaintiffs' central challenge to Defendants' regulatory jurisdiction. Because these issues could not materially affect the outcome of litigation, they are not controlling questions of law subject to interlocutory appeal. *See United States Rubber Co. v. Wright*, 359 F.2d 784, 783 (9th Cir. 1966) (per curiam).

514 U.S. 594 (1995), that is contrary to the result reached in *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995).

Despite the possible intra-circuit splits on these issues, "it is the duty of the district judge . . . to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a substantial ground for dispute." *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996). Thus, the issue to be decided requires analysis of the strength of the arguments in opposition to the challenged ruling as they apply to the existence of a substantial ground for dispute in the Ninth Circuit. While Plaintiffs repeatedly state that "this is a case of first impression involving mere plowing activities," *see, e.g.*, Pls.' Reply at 11, "the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion." *In re Flor*, 79 F.3d at 284. Notwithstanding the D.C. Circuit's distinction of the Ninth Circuit's holding in *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990), *see National Mining Ass'n*, 1998 WL 321064,at *6, *Rybachek's* holding that redeposit of earth can constitute "addition of a pollutant" controls in this circuit. *See Rybachek*, 904 F.2d at 1285-86. Finally, although *Leslie Salt* does not address the impact of *Lopez* on the validity of the migratory bird rule, it is presumed that the Ninth Circuit panel deciding the case knew that it was not bound by earlier Ninth Circuit precedent if the Supreme Court had changed the law in *Lopez*. Since the law in the Ninth Circuit appears to be settled on the issue of Defendants' CWA jurisdiction, this element does not favor granting the certification request. Furthermore,

even if Plaintiffs are correct in their argument that Ninth Circuit authority fails to pointedly address issues in suit, the certification request is nevertheless denied because Plaintiffs fail to satisfy the third element.

The third element requires consideration of whether an immediate appeal from the Order may materially advance the ultimate disposition of the action. Plaintiffs bear the burden of showing that the circumstances justify a departure from the basic policy of postponing appellate review until after entry of a final judgment. *See In re An. .rust Litigation*, 673 F.2d at 1026. Defendants argue that such an appeal could have "the effect of delaying the resolution of this litigation, because an appeal would almost certainly not be completed before February 1999 when trial is currently scheduled." *See* Defs.' Opp'n at

The course that Plaintiffs seek to pursue does not bode well for a prompt resolution of the issues in suit. Plaintiffs state that they contemplate ultimately seeking review in the United States Supreme Court, should the Ninth Circuit disagree with their position. *See* Pls.' Mo at 19. Further, Plaintiffs contend that unless the Court modifies the remand of "the predicate factual issues relevant to the Government's counterclaims . . . , plaintiffs fully expect that this Court will vacate the existing trial date and other case deadlines and stay this litigation until the [Corps'] processing of plaintiffs' permit application is complete – a lengthy process which could literally take years."[5] *See* Pls.' Mot. at 7 (emphasis added).

[5] Defendants have requested the Court to defer remand "until resolution of the United States' enforcement action in its Counterclaim against Mr. Tsakopoulos because Corps' regulations prohibit processing such 'after the fact" permits when enforcement litigation has been initiated by Federal, state, or local agencies. 33 C.F.R. § 326.4(e)(iv)." *See* Defs.' Opp'n at 15 n.10. While contending that they will suffer unjust, burdensome, and lengthy delay if their motion is not granted and they are forced to complete the permitting process, *see* Pls.' Mot. at 11-15, Plaintiffs simultaneously oppose Defendants' request to defer the process, *see* Pls.' Reply at 12-14.

33 C.F.R. § 326.3(e)(iv) supports Defendants' position and provides that "no permit application will be continued when the district engineer is aware of enforcement litigation that has been initiated. . . . " The district engineer alone appears vested with discretion under 33 C.F.R. § 326.3(c)(1) to make exceptions to strict application of § 326.3 (e)(iv), and apparently none have been found applicable here. Accordingly, the remaining factual disputes on Defendants' counterclaim will be resolved in the litigation without resort to completion of the permitting process.

As to modification of the case management order, the Court stated at the hearing on the cross-motions for summary judgment on May 18, 1998, that it would make the requested modifications regarding disclosure of experts and discovery cut-off. *See* R. at 62. The Court also stated that it would modify other case management dates if the ruling on summary judgment indicated the need. *See id.* In light of this ruling's deferral of completion of the permitting process, no further modification of the case management order seems necessary. If the parties, however, desire further modification, they have leave to show cause why such modification should be granted.

An immediate appeal would neither materially advance resolution of these issues, nor the other factual issues attendant to the Court's jurisdiction. *See Shurance v. Planning Control Int'l*, 839 F.2d 1347, 1348 (9th Cir. 1988) (denying interlocutory appeal where it "might well have

the effect of delaying [the] litigation"). The motion for certification under 28 U.S.C. § 1292 (b) is DENIED.

IT IS SO ORDERED.

Dated: August 7, 1998

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BORDEN RANCH PARTNERSHIP and ANGELO K. TSAKOPOULOS, Plaintiffs, v. UNITED STATES ARMY CORPS, OF ENGINEERS and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Defendants.	CIV. S-97-0858 GEB JFM FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Nov. 8, 1999)
And Related Counterclaim.	

Plaintiffs Borden Ranch Partnership ("the Partnership") and Angelo K. Tsakopoulos ("Tsakopoulos") commenced this action May 7, 1997, alleging statutory and constitutional claims and seeking declaratory and injunctive relief. The United States Environmental Protection Agency ("the EPA") counterclaimed for alleged violations of the Clean Water Act, 33 U.S.C. § 1311. Summary adjudication in favor of Defendants on Plaintiffs' claims was granted by an Order entered June 9 and amended August 3, 1998 ("the August 3, 1998, Order"). The counterclaim was tried to the bench from August 24 to September 16,

1999. The Court's findings of fact and conclusions of law are as follows.

I.

FINDINGS OF FACT

Findings of fact regarding background information are contained in subsection A., *infra*. Subsection B. describes specific impacts upon relevant hydrological features.

A.

Background

On June 30, 1993, Tsakopoulos acting as general partner of the Partnership purchased 8,348 acres of land situated ten miles east of Galt, California for approximately $8.3 million. Exhs. 4, 7, 8.[1] This noncontiguous property ("Borden Ranch") straddles Dry Creek, which forms the border between Sacramento County (to the North) and San Joaquin County (to the South). Approximately seventy percent of the property is north of Dry Creek. Exh. 67. Borden Ranch previously had been used primarily as rangeland for grazing cattle and producing wheat, hay, alfalfa, tomatoes, sugar beets, beans, and corn. Tsakopoulos intended to convert the majority of the land for use as vineyards and orchards to increase the value of the property.

Besides Dry Creek, Borden Ranch encompasses Goose Creek – which runs east to west through the San

[1] The property is titled in Tsakopoulos himself.

Joaquin County portion of Borden Ranch – and a significant number of hydrological features known as swales, vernal pools, and intermittent drainages. A swale is a sloped wetland containing aquatic plant life which allows passage of small animal life, slows peak water flows, filters water, and minimizes erosion and/or sedimentation. A vernal pool is a low point in the landscape underlain with a dense soil layer and wherein rainwater collects. Generally, it is inundated part of the year and is dry during the summer, and may or may not be connected with other hydrological features. Vernal pools also commonly serve as habitat for exotic species of wildlife that have adapted to these features' uncommon characteristics. Some of these species have been deemed threatened or endangered under the Endangered Species Act. In the United States, vernal pools are found chiefly within California and are prevalent in the Central Valley. Intermittent drainages are basically streams or water courses with a defined bed and bank that generally transport water during and after rains. The intermittent streams on the San Joaquin County portion of Borden Ranch are tributaries of Goose Creek and Dry Creek, which are tributaries to the Cosumnes and Mokelumne Rivers.

Most of Borden Ranch is underlain with a dense layer of soil, called a "restrictive layer," or "clay pan," which prevents surface water from reaching the depths required to be reached to successfully utilize the property for vineyards and orchards, which have deeper root systems than crops previously grown on the property. Consequently, Tsakopoulos planned to plow much of the property using plows that dig into the ground to a depth of

five to seven feet. This is called "deep ripping" and is accomplished by dragging long metal "shanks" through the ground. Deep ripping alters the movement of surface and subsurface water in the ripped areas by moving earth, rock, sand, and biological matter both horizontally and vertically. This allows water to percolate to greater depths and limits or destroys the ability of jurisdictional waters to retain water. Borden Ranch also was plowed occasionally to a depth of 12 to 16 inches using a method called "discing." The purpose of these plowing activities was, in part, to disturb the restrictive layer of the soil so that deeper layers of soil could accept and retain moisture.

Tsakopoulos was aware of the presence of swales, drainages, and vernal pools on the property at the time he purchased Borden Ranch. Exh. 2. He also was aware that most or all of these features constituted "waters of the United States" within the meaning and coverage of the Clean Water Act ("the Act"); and, that any discharge of fill material into a water of the United States was prohibited by the Act unless a permit was obtained from the United States Army Corps of Engineers ("the Corps"). Tsakopoulos has also been a real estate developer since the early 1960s and had dealt with the Corps and applied to the Corps for permits under the Act, on several occasions since the mid-1980s in connection with activities associated with various projects he was undertaking which implicated the Act and the Corps's jurisdiction thereunder. He had previously learned that there exists an exemption from the Corps's permit requirement for certain farming activities, including plowing, and he

questioned whether this exemption applied to his contemplated deep ripping activity.

Sometime in mid-1993, Tsakopoulos contacted Thomas Coe, an officer at the Sacramento District of the Corps, and asked him whether the land preparation activities he anticipated undertaking on Borden Ranch would require a permit. Coe told him that a permit could be required if those activities would affect wetlands. Shortly thereafter, Tsakopoulos met with Coe and other Corps officials to discuss whether the planned plowing would be exempt from coverage under the Act as agricultural activity. The Corps maintained that a permit would be required. In late October of 1993, Tsakopoulos notified the Corps that he planned to cause plowing of a 444-acre portion of Borden Ranch on the Sacramento side of Dry Creek, known as the Castlehill parcel, and that this plowing would impact approximately seven acres of wetlands. Tsakopoulos hoped this notification would enable him to obtain authorization under a "nationwide permit," by which the Corps has allowed otherwise-prohibited discharges of dredge or fill material into a certain maximum area of jurisdictional waters conditioned upon, *inter alia*, prior notice being given to the Corps. *See* 33 C.F.R. Part 330, App. A(B)(26) (1993). When Corps representative Karen Shaffer visited the property in October of 1993 to verify certain wetland delineation maps provided by Tsakopoulos, she noted that Tsakopoulos's crews had already commenced deep ripping the property and were driving their plows over wetlands with the metal shanks raised at least partially out of the ground. She perceived that this activity disturbed the soil to a depth of approximately six inches. Exh. 9. Consequently, she told

Tsakopoulos's representative then that undertaking such activity on the property's wetlands without a permit would violate the Clean Water Act. *Id.* An attorney for Tsakopoulos thereafter wrote to the Corps, indicating that Tsakopoulos had a sale of that parcel pending and requesting immediate advice regarding whether the planned ripping and discing activities on the Castlehill parcel could proceed. Exh. 10. The Corps responded via a letter in early November 1993 wherein the Corps reiterated that Tsakopoulos's indicated activities could cause "discharge of dredged or fill material in waters of the United States" and that this would be allowed to occur into up to one acre of wetlands on the parcel under the nationwide permit, but a permit would have to be obtained "under Section 404 of the Clean Water Act" if more than one acre was affected. Exh. 11.

When the Corps concluded that the impacts of the proposed plowing on the Castlehill parcel would not be "minimal," it notified Tsakopoulos in late November of 1993 that he was not eligible for the nationwide permit. Exh. 12. The parties undertook further negotiations and, in March of 1994, the Corps agreed to allow the Castlehill plowing to take place in exchange for certain mitigation activities being undertaken by Tsakopoulos. Specifically, Tsakopoulos was required to construct 4.77 acres of seasonal wetlands and to enhance and preserve certain other wetlands on the property. An after-the-fact permit for the Castlehill project issued March 15, 1994. Tsakopoulos eventually sold the Castlehill parcel in September of 1994 for approximately $1.66 million. Exh. 67.

In May 1994, Tsakopoulos evinced a change of heart regarding Borden Ranch; he wrote to the Corps stating

that he had abandoned his plan to convert the majority of Borden Ranch for use as vineyards due to the expense attended to the permitting process. Exh. 547. He said he would focus on continuing use of the property for ranching purposes. By missive dated July 6, 1994, the Corps reiterated its position that deep ripping would not be exempt from Clean Water Act regulation. Exh. 24. In late September of 1994, Tsakopoulos and the Corps met with representatives of the EPA to discuss whether certain range management activities would be exempt from regulation under the Clean Water Act. At this meeting, Tsakopoulos indicated that he still intended to deep rip the "uplands" – areas that are not federal wetlands – and the Corps indicated that this would not require a permit. Tsakopoulos further sought to drive deep ripping equipment over wetlands with the shanks raised to their uppermost position in order to avoid plowing those wetlands. Tsakopoulos's consultant, Andrew Johas, represented that this would result in no continuous disturbance, but only in occasional "tagging" of the soil as bumps in the landscape met the raised shank. The Corps agreed to allow this driving over the swales, but forbade driving over the vernal pools.[2]

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[2] Tsakopoulos testified at the bench trial that the agency officials had stated at this meeting that the vernal pools could legally be disced without a permit. That testimony was not veracious and is belied by the consistent position federal officials expressed to Tsakopoulos on this matter. As to the directives Tsakopoulos was given about deep ripping activity in jurisdictional wetlands, the no-ripping directive was clear and unwavering. Although Tsakopoulos attempted to show that there was confusion about this amongst federal agencies, the directive he received from the Corps was categorical and pellucid.

In April of 1995, the Corps discovered that deep ripping of wetlands had occurred on another portion of Borden Ranch called the Prudential parcel. A Cease-and-Desist letter issued April 12, 1995, that directed Tsakopoulos to stop deep ripping activities in waters of the United States. Exh. 30. At an April 18, 1995 meeting with representatives from the Corps, Tsakopoulos contended his understanding after the September 1994 meeting had been that all portions of Borden Ranch could be deep ripped except the vernal pools. Exh. 558. After further discussions that month, Tsakopoulos submitted an application in May of 1995 for a permit covering a 1,268-acre area in Sacramento County. Exh. 36. In conjunction with this application, Tsakopoulos agreed to set aside 1,600 acres of Borden Ranch north of Dry Creek as a wetland preserve. *Id.* The application was handled on an "emergency" basis; a permit was sent to Tsakopoulos for his signature at the end of May 1995. However, Tsakopoulos objected to certain details in the permit, drew a line to exclude the mitigation provision, and then signed and returned the permit to the Corps. Exhs. 38, 40. The Corps responded by informing him in a June 30, 1995 letter that his alteration voided the permit and he was deemed to be proceeding without one. Exh. 40. In mid-July, Tsakopoulos submitted another permit application to construct and operate a separate 816 acres of vineyards on the Sacramento County side. Exh. 572.

Deep ripping activities continued on the Sacramento County side without a permit and commenced on the San Joaquin County side of Borden Ranch in October of 1995. In November of 1995, the Corps learned that deep ripping on wetlands had again occurred, this time in two areas on the Sacramento County side, one of which had

been part of the wetlands preserve that Tsakopoulos had indicated would be set aside as mitigation in his May 1995 permit application. Exhs. 580, 582. A second Cease-and-Desist letter issued November 22, 1995. Exh. 50.

Deep ripping on the San Joaquin County side proceeded initially in parcels numbered 6 and 10. Exh. 47. It is unclear to what extent flagging of jurisdictional waters had taken place there. At a late November 1995 meeting attended by representatives of Tsakopoulos and Sugnet and Associates ("Sugnet"), the company hired by Tsakopoulos to assist in the permitting process, the flagging and marking of property on the San Joaquin County side of Borden Ranch was discussed. Deep ripping also occurred in parcels 8 and 9 on the San Joaquin County side, where only vernal pools had been flagged to alert deep ripper equipment operators to avoid them. The senior project manager from Sugnet told Tsakopoulos that flagging was done *only* around vernal pools pursuant to a direction from Chris Vrame, one of Tsakopoulos's consultants. Vrame, who also was present, told Tsakopoulos that he had received such direction in a memorandum from Tsakopoulos's company, AKT Development Corporation. Tsakopoulos became very upset, and Vrame directed that flagging be placed around all swales and drainages on the San Joaquin side and that aerial photographs be taken of the damaged areas.

On December 4, 1995, Coe and Tsakopoulos visited a portion of the Sacramento County side of Borden Ranch, delineated as parcel 15, and observed that some of the swales located thereon had been deep ripped and then disced, resulting in their complete obliteration, and that only some of the vernal pools had been flagged by the plowing crews. Those not flagged had been filled in with

soil. Tsakopoulos indicated that he had told the plow operators to completely avoid the vernal pools. In late December of 1995, Tsakopoulos executed a contract to sell parcel 10 on the San Joaquin County side, encompassing 197 acres, to a California partnership called Watts Vineyard for $574,000. Exh. 60. By the end of 1995, Tsakopoulos had sold two other parcels totaling approximately 1,266 acres for slightly more than $5.45 million, in addition to the Castlehill and Watts Vineyard sales. Exh. 67.

In early January of 1996, Sugnet prepared a summary of the amount of acres of "basins" and swales that had been deep ripped. The "basins" therein referred to vernal pools. According to Sugnet's summary, 0.52 acres of swales had been deep ripped on the San Joaquin County side of the property in parcels 6 and 10. Exh. 61. This summary was transmitted to Vrame.

In February of 1996, the EPA entered into discussions with Tsakopoulos aimed at the execution of an Administrative Order on Consent ("AOC") which would address all Clean Water Act violations on the Sacramento County side of Borden Ranch. In March of 1996 Tsakopoulos submitted a map delineating wetlands features on the San Joaquin County side. Exh. 63. An officer from the Corps, Thomas Cavanaugh, visited Borden Ranch twice in early April 1996 to verify this delineation map. During his visits, he noted that several swales on parcels 6 and 10 had been deep ripped; furrows caused by plowing in those areas were two-to-three feet deep and crossed over the wetlands. However, vernal pools on parcel 10 apparently had been avoided by the plows. After field verification was completed, the wetlands delineation map was revised. The Sugnet wetlands delineation map identified

a total of 66.29 acres of "jurisdictional waters" of the United States on the San Joaquin County side of Borden Ranch. Exh. 65.

Tsakopoulos entered into a contract in March of 1996 to sell a 400-acre portion on the Sacramento County side to a California corporation, Farmland Management Services, for $1.4 million. Exh. 588. By April 30, 1996 he had sold or had sales pending for 4,036 acres of Borden Ranch. Exh. 67. The total sales price for this property equaled approximately $16.2 million. *Id.*

On May 3, 1996, a final AOC was executed which resolved the alleged Clean Water Act violations[3] on a 2,100-acre portion of Borden Ranch north of Dry Creek, whereon the EPA had alleged that 49 .1 acres of waters of the United States had been disturbed. Exh. 66. It was agreed that a 1,368-acre preservation would be set aside as mitigation for these violations and that Tsakopoulos would pay $44,700 to maintain the preserve. *Id.* The AOC also memorialized Tsakopoulos's contention that this preserved land "contain[ed] environmental and wildlife functions in excess of that which is needed to compensate for the alleged impacts to functions of waters of the United States resulting from" Tsakopoulos's plowing activities. Exh. 66. It was agreed that the EPA and/or Tsakopoulos would undertake further studies regarding the possibility that he had undertaken excess mitigation and would, if any dispute thereafter remained, submit the dispute for resolution by the EPA's Regional Administrator and the Corps's District Engineer. *Id.* at 13-14. Finally,

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[3] Tsakopoulos did not admit therein that any violation had occurred. Exh. 66 at 9.

Tsakopoulos agreed to cease further discharges into waters of the United States "except in compliance with an appropriate authorization under the" Clean Water Act. *Id.* at 11. A permit for the 2,100-acre portion on the Sacramento County side which was covered by the AOC issued May 8, 1996. Exh. 593.

In late June of 1996, Tsakopoulos's consultants learned that agents of McCarty Co., which had purchased an 800-acre portion of Borden Ranch in 1995, had illegally plowed and filled in almost half of the wetlands on that portion. Exh. 600. Tsakopoulos directed the consultants to monitor McCarty Co.'s activities on the parcel. *Id.*

By letter dated July 8, 1996, the Corps informed Tsakopoulos's project manager that the wetlands delineation map submitted in March and revised in April had been "reviewed and verified." Exh. 70. That letter also stated, in part:

> Our jurisdiction in this area is under Section 404 of the Clean Water Act. A Department of the Army permit is required prior to discharging dredged or fill materials into waters of the United States. Discharge of dredged material includes but is not limited to any addition, including redeposit, of dredged material, including excavated material, into the waters of the United States which is incidental to any activity including mechanized land clearing, ditching, channelization, or other excavation. Accordingly, a permit will be required PRIOR TO ENGAGING IN ANY EARTHMOVING ACTIVITY in any of the 66.29 acres of waters, including the swales, present on [the San Joaquin County side of] Borden Ranch. . . .

> In addition, two areas on the San Joaquin County portion were deep ripped without Department of the Army authorization. These violations were not resolved with the Administrative Order pertaining to other portions of the ranch. Therefore, a permit application, along with a mitigation plan, should be submitted as soon as possible if your client wishes to retain these fills.

Id. (emphasis in original).

On September 5, 1996, Tsakopoulos and several representatives from the Corps, the EPA, and the offices of certain United States legislators visited Borden Ranch to inspect vernal pool sites. The Corps's representatives reiterated that wetlands on the property could not legally be deep-ripped without a permit and that vernal pools had to be avoided. Exh. 615. Tsakopoulos understood and agreed. In late September of 1996, Tsakopoulos met with Champ to discuss ongoing plowing activities on the San Joaquin County portion of Borden Ranch. Exh. 77. Tsakopoulos indicated that he would file a permit application by mid-October 1996. *Id.* Shortly thereafter, Champ wrote to Tsakopoulos and reiterated his belief that Tsakopoulos then "understood that the discharge of fill material, including redeposit of excavated material for the purposes of installing vineyards in rangeland, requires a Section 404 permit." Champ further wrote that "any earthmoving activities that involve waters of the United States, including swales," required a permit. *Id.*

In November of 1996, Cavanaugh again visited the San Joaquin County portion of the property after having been told by one of Tsakopoulos's employees that deep

ripping had resumed there. He saw that parcels 6, 8, and 9 had been deep ripped and observed evidence of tracks evidently left by deep ripping equipment evincing that some of the swales on those parcels had been deep ripped. He also noted that parcel 10 – which earlier had been sold to Watts Vineyard – had been disced and planted with vineyards.

By the end of 1996 Tsakopoulos had not yet filed a permit application for the remaining activities on Borden Ranch. In a December 23, 1996 letter, he wrote to Champ explaining that "the delay to date in submitting the application" had been caused by the "time-consuming and costly" process of "gathering the voluminous information required for the application." Exh. 92 at 1. Tsakopoulos further mentioned instances involving his contention that the Corps had previously said he could "shallow plow through drainage swales." Tsakopoulos concluded the letter by complaining about the involved federal agencies' continued "effort to prevent ongoing agricultural activities from proceeding on Borden Ranch and stated that "the financial cost to the Partnership of this prolonged situation has been colossal." *Id.* at 3-4. Champ responded with a letter dated January 17, 1997, wherein he stated, *inter alia,* that "the conversion activities you have engaged in [on Borden Ranch] and wish to continue with are not covered by any existing exemptions and require Department of the Army authorization ." Exh. 95. Champ concluded by indicating that expedited processing for any permit application would not be available to Tsakopoulos. "Therefore, if you wish to proceed with additional vineyard installation on Borden Ranch this

Spring, you need to submit your permit application very soon." *Id.*

In late January 1997, Tsakopoulos submitted a permit application for the remainder of the Borden Ranch project: the conversion of approximately 832 acres in Sacramento County and 2,418 acres in San Joaquin County. Exh. 96. It was estimated therein that 77.19 acres of waters of the United States existed in the San Joaquin portion; that only 21.79 acres of these jurisdictional waters would be affected by discing operation;[4] all vernal pools were to be avoided on the San Joaquin County side; "deep plowing will occur in upland areas"; "[w]hen passing through [waters other than vernal pools], the shank will be raised to its maximum height"; and, Tsakopoulos proposed setting aside a preserve totaling approximately 523 acres in mitigation of the proposed plowing effects; of which 51 acres would be wetlands. *Id.* In response to the question on the form application, "Is Any Portion of the Work Already Complete?", Tsakopoulos answered affirmatively and explained as follows:

> Upland areas of Parcel 1 in Sacramento County and Parcels 6, 8, and 9 in San Joaquin County have been deep ripped. Vernal pools and major drainages were avoided. The shank was raised as high as possible when passing through major drainages.

Id.

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[4] A revision provided to the Corps in early February altered these numbers slightly. Of 77.16 acres estimated to constitute wetlands on the San Joaquin County portion, 20.66 acres were predicted to be directly impacted by plowing activities. Exh. 97.

However, there was no mention in this application that deep ripping had occurred within parcel 10 on the San Joaquin County side of Borden Ranch. Further, the record reveals that on many occasions, the shank had not been raised as high as possible as it passed through drainages.

In a letter dated March 21, 1997, the United States Fish and Wildlife Service ("the Service") wrote to the Corps against the January 1997 permit application, stating:

> It has come to the Service's attention that [Tsakopoulos] has recently engaged in unauthorized deep ripping on approximately 400 acres of land in the southern-most San Joaquin portions of the Borden Ranch property. In addition, the Service has been informed that a second potential [Section] 404 violation has occurred on a 200 acre parcel that lies northwest of the San Joaquin project area within the Borden Ranch boundary. This 200 acre section of land was deep ripped and subsequently sold. An undetermined amount of wetland impacts have occurred from these actions.

Exh. 100.

The Service also described the impacts upon wildlife that the proposed plowing would have, as well as the indirect and negative effect that conversion to vineyards could have on vernal pools. *Id* .

Coe sent Tsakopoulos a letter dated March 25, 1997, in which Coe explained that the Corps had received objections to his application from the Service, the EPA, the State of California, and other concerned organizations and citizens. Exh. 101. Copies of those letters of objection

were provided with Coe's letter. Coe also indicated that the Corps's decision on the application would be delayed until April 23, 1997, in order to allow Tsakopoulos the opportunity to rebut these objections or propose mitigation measures appropriate to resolve them. *Id*. Coe added:

> In addition it is apparent that, once again, land preparation activities have been ongoing without Department of the Army authorization. One parcel in San Joaquin County, Parcel 10, has apparently been sold and has already been planted in vineyards. The wetland swales and drainages on this parcel have been filled and the vernal pools within the vineyard have been severely degraded by the surrounding vineyard activities. In addition a large portion of Borden Ranch has been ripped and disced without Department of Army authorization. It is obvious that the ripper shank passed through many of the swales and drainages. Soil was moved into a number of these drainages by turning equipment and at least one vernal pool within this area was directly affected by the ripping and discing operation. It also appears that the ripping equipment is positioned and ready to resume ripping operations.
>
> . . . No further soil manipulation should occur in those areas of Borden Ranch for which a permit has not been issued until a final permit decisio· has been made for the remainder of the property.

Id.

On April 10, 1997, EPA investigators visited· Borden Ranch and observed fully-engaged deep rippers passing over jurisdictional wetlands in parcel 8. On April 14,

1997, the EPA issued an Administrative Order, signed by the Acting Director of the EPA's Water Division, Alexis Strauss, finding that Tsakopoulos had violated the Clean Water Act during plowing activities commencing in October, 1996. Exh. 103. That Order directed Tsakopoulos to provide to the EPA, within five days, written certification "under penalty of law" that activities affecting jurisdictional waters had ceased and to specify the date and time of cessation. *Id.* Tsakopoulos sent a reply letter to Strauss dated April 21, 1997, in which Tsakopoulos questioned the regulatory authority "of both the EPA and the Corps" over his plowing activities on Borden Ranch and said no "unauthorized activities" had been conducted "in any 'waters of the United States,' except for one minor involvement of shallow plowing in a swale – the mistaken action of a party which purchased a parcel at Borden Ranch." Exh. 639 at 2. He declined to certify that the alleged unpermitted discharges had ceased, opining that the EPA had no power to require the certification. *Id.*

Shortly after Tsakopoulos received the Administrative Order from the EPA, his chief consulting firm for the Borden Ranch project, Foothill Associates ("Foothill"),[5] visited parcels 6, 8, and 9 in order to place metal T-posts around the swales and intermittent drainages on these parcels. Sugnet had previously caused the vernal pools thereon to be so marked.[6] Foothill placed stakes 10 to 15

[5] Foothill had replaced Sugnet as the chief consultant on this project sometime between late 1995 and early 1996.

[6] Initially, the markings were problematic because they were not conspicuous enough to be observed by deep ripper operators. They improved over time, but they probably could not be easily seen at night when much of the deep ripping activity occurred.

feet outside of what was perceived to be the limits of jurisdiction to create a buffer zone.

Between April 17 and April 25, 1997, the EPA's wetlands consultant, Dr. Lyndon C. Lee, visited Borden Ranch with some of his employees to document violations of the Clean Water Act on parcels 6, 8, 9, and 10 on the San Joaquin County side. Exh. 156. He was accompanied by an EPA representative each day; most often, that representative was Robert Leidy. While at the property, Leidy observed a deep ripping machine with its shank in the uppermost position. In this position, the cutting edge of the shank was completely out of the ground. Leidy also saw furrows that were two to three feet deep crossing through two swales and a vernal pool on parcel 9 and noted that five vernal pools on parcels 6 and 8 had been completely filled in. On April 25, 1997, Dr. Lee met with Tsakopoulos and discussed Dr. Lee's observations of deep ripping across jurisdictional wetlands. Tsakopoulos initially expressed that there had been no deep ripping on wetlands. Together they visited several jurisdictional features, including a vernal pool in parcel 9 around which five-foot-high metal stakes had been placed. The stakes had been knocked over and marks on the ground indicated that a deep ripper had crossed through the feature several times without its shank raised. Tsakopoulos then conceded that mistakes had been made.

After making his observations on Borden Ranch, Dr. Lee caused to be created a 96-page, 11" x 17" document entitled "Documentation of Impacts" which described the effect that plowing within the studied parcels had on 40 linear features – *i.e.*, swales and intermittent drainages – and on six vernal pools. This document was subsequently revised; the current version is dated April 28, 1999. Exh. 148.

B.

Impacts upon Waters of the United States

Dr. Lee's "Documentation of Impacts" is the most thorough documentation that has been made regarding Clean Water Act violations in the relevant portions of Borden Ranch. Based upon his report and other evidence presented during the bench trial, this Court finds that, under the preponderance of the evidence standard, deep ripping on Borden Ranch caused fill material to be discharged into 35 hydrological features situated in parcels 6, 8, 9, and 10 on the San Joaquin County side of the property. Of these 35 features, 28 are or were swales or intermittent drainages that are hydrologically related to navigable, interstate waters. One feature is a depression that is adjacent to a swale that is hydrologically related to navigable, interstate waters. The remaining six features are or were isolated vernal pools. The "drainage" numbers and "depression" numbers that are referred to herein are taken from Dr. Lee's report and testimony. Exh. 148. A "drainage" number refers to either a swale or an intermittent drainage; a "depression" number denotes an isolated vernal pool.

Parcel 10, shaped roughly like a right triangle, is the northwesternmost parcel on the San Joaquin County side of the property. It shares no boundary with the other parcels on the south side of Dry Creek. Drainage 9 is an approximately 800-foot-long intermittent drainage flowing north to south in the southeast corner of this parcel. It has been completely filled by deep ripping, discing, and the planting of vineyards. The deep ripper shank passed through this drainage several dozen times with its shank down. Drainage 10 is a 1,300-foot-long north/south intermittent drainage flowing to the southern boundary of parcel 10. This wetland also has been nearly completely obliterated due to several passes by a deep ripper with its shank down, subsequent discing and planting with vineyards. Drainage 34 is a swale that runs north to south for approximately 200 feet and reaches the southern border of parcel 10 roughly 850 feet west of drainage 10. This also has been completely filled after several passes with a fully-engaged deep ripper and subsequent discing and planting with grapes. Drainage 35 is another swale, situated near the southwestern corner of parcel 10, which has been deep ripped, disced and planted with vineyards. It was approximately 700 feet long and has been completely filled. Nearby on parcel 10 is drainage 36, which has been completely filled by deep ripping, discing and planting. It had been a swale of approximately 350 feet in length. Along the northwestern boundary of parcel 10 lay a 150-foot long swale, drainage 37, which slopes down toward the northwest and Dry Creek. It also has been completely filled by deep ripping, discing, and planting of vineyards. Approximately 940 feet to the east of that is drainage 38, a 200-foot-long swale also sloping to the northwest and

which has been similarly filled. The final affected feature on parcel 10 is drainage 40, a forked swale totaling 1,450 feet in length and situated in the northeast corner of this parcel. The entire feature is filled after deep ripping; the north-south portion of the swale is planted with vineyards and the east-west stretch is currently used as a dirt road connecting two other roads that run along the eastern and northwestern boundaries of the parcel.

Parcel 8 is a 150-acre portion of Borden Ranch adjacent to and north of Goose Creek. Drainage 5 is an intermittent drainage that flows north to south for 800 feet along the western boundary of the parcel. It has been deep ripped and partially filled in. Drainage 7 is centrally located on the parcel and flows south into Goose Creek. It is an 846-foot-long intermittent drainage and has been partially filled by deep ripping. Drainage 8 is a 1,357-foot-long intermittent drainage which flows south meeting Goose Creek approximately 1,000 feet upstream from drainage 7. It has been deep ripped and partially filled. Depression 2 is a vernal pool located in the northwestern corner of parcel 8, approximately 375 feet west of Mackville Road. The pool had covered an area of roughly 150 square feet, but has been deep ripped, disced, cultivated, and completely filled. Two other, larger vernal pools that lay within approximately 150 feet of this pool were not plowed. Each of them was studied in May of 1997 and March of 1998 and was found to be inhabited by *branchinecta lynchi*, or vernal pool fairy shrimp, a threatened species under the Endangered Species Act. Exh. 138. When the closer of the nearby pools floods, water therein occasionally spills into depression 2, which is located slightly downgrade. Considering the proximity of these

pools and this hydrological relationship with one of them, depression 2 more likely than not served as a habitat for vernal pool fairy shrimp before it was plowed. The last feature on parcel 8 is a 460-foot-long swale – drainage 20 – located in the northeast corner of the parcel. This feature has been deep ripped and disced and, resultantly, partially filled.

Parcel 9 is another 150-acre parcel east of parcel 8 and Mackville Road and north of Goose Creek. Drainage 19 flows for approximately 1,620 feet southward near the western boundary of the parcel and into the Creek. This feature starts as a swale and, after 900 feet, acquires the characteristics of an intermittent drainage. The upper swale portions have been partially filled due to deep rippers plowing to the edge of the feature and depositing soil into the swale. The lower intermittent drainage has been similarly affected by adjacent deep ripping. Drainage 23, a 430-foot-long swale, is another feature adjacent to which there has been deep ripping that has lead to a discharge of fill material into the wetland. Situated in the northeastern corner of parcel 9, drainage 29 is a "Y"-shaped swale totaling 1,077 feet in length into which, due to proximate deep ripping, a small amount of fill material has been deposited. To the west of drainage 29 are drainages 30 and 31. These north-to-south swales have been deep ripped through near where they meet Goose Creek, resulting in significant discharges of fill into each body of water. Upon Dr. Lee's visit to these swales, he observed continuous furrows measuring approximately two feet from the base of the trench to the

top of the mounds on each side and stretching perpendicularly across each feature at intervals of approximately 15 feet.[7] A vernal pool designated depression 1 lay north of drainages 30 and 31. This is the pool whereat Tsakopoulos himself witnessed that plows had knocked over the metal stakes which had surrounded the feature. Approximately 215 square feet in area, this pool has been completely obliterated by deep ripping and discing; however, the pool was deep ripped through in only one direction, rather than two directions like the adjacent uplands. Sampling of the pool in May of 1997 demonstrated the presence of certain vernal pool obligate plant species, including Eryngium and Psilocarphus. These species can only survive in wetlands that are inundated for a substantial portion of the year. However, there has been no showing that vernal pool fairy shrimp inhabited this or any nearby pool. Nor has it been shown that this pool supported any other threatened or endangered species prior to its having been deep ripped. There is credible evidence in the record that certain migratory birds were spotted on other, rather distant portions of Borden Ranch[8] and evidence reveals that relatively small vernal

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[7] Tsakopoulos has attempted to attribute these phenomena to deep rippers passing over the swales with the shank raised to the uppermost position. However, the evidence reveals that the furrows were not caused by shanks tagging the surface.

[8] Over the course of at least seven-days' observations over the course of the year May of 1997 through April of 1998, migratory birds apparently were sighted only once within 1,000 feet of this pool; on June 19, 1997, horned lark were spotted somewhere along drainage 30, which is situated 300 feet from depression 1 at its closest point and 900 feet at its farthest. Exh. 146.

pools like depression 1 can be used by migratory birds for feeding, resting, cover, and breeding. However, it has not been demonstrated that depression 1 was a potential habitat for migratory birds. The final relevant feature in parcel 9 is drainage 32, an intermittent drainage 300 feet in length that has been deep ripped, disced, and planted. Resultantly, this feature is nearly completely obliterated.

The final parcel at issue, number 6, is located on Borden Ranch south of Goose Creek. Depressions 3 through 6 – vernal pools situated in the southwesternmost portion of the parcel – have been completely obliterated by deep ripping and discing. These four pools were each approximately 150 square feet in size. Approximately 175 feet north-northeast of depression 3 there exists a vernal pool – one much larger in size than the plowed pools – in which vernal pool fairy shrimp were found during sampling in May of 1997. Exh. 138. However, thorough sampling of depressions 3 through 6 revealed no threatened or endangered species.[9] There is also insufficient evidence in the record to establish either that vernal pool obligate plant species inhabited these pools, that these pools were hydrologically related to a pool inhabited by a threatened or endangered species, or that such a species had been or would be brought to one or more of these pools via some other mechanism, such as through its attachment to wildlife that had or would frequent other pools. Additionally, it has not been

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[9] In testing each of depressions 3 through 6, twice as much material was sampled as was taken from other vernal pools on Borden Ranch.

demonstrated that any of these pools could potentially serve as habitat for migratory birds.

Turning to the linear hydrological features of parcel 6, drainage 1 is a multi-branched hydrologically-interrelated system broken down by Dr. Lee into six features: four swales, an intermittent drainage, and a depression. Only three of them are alleged to constitute violations. Drainage 1C is in fact an ellipse-shaped depression measuring approximately 38 feet on its longer axis. This depression is adjacent to drainage 1B, which is a swale that flows into drainage 1A and ultimately into Goose Creek. Twelve linear feet at one end of drainage 1C have been deep ripped and disced; resultantly, that end of the depression has been completely filled. Drainage 1D is a 458-foot-long swale and drainage 1E is a 150-foot-long swale. Each has been deep ripped, disced, and partially filled. Situated at the western boundary of parcel 6, drainages 3 and 4, are swales that have been partially filled by deep ripping and discing. A 2,080-foot-long intermittent drainage which flows northward toward Goose Creek – drainage 13 – also has been partially filled by deep ripping and discing. Nearby, drainages 14, 15, and 18 are smaller features which have been deep-ripped across at certain points. Fill has been deposited therein as a result. Finally, drainages 25 and 26 are situated on the eastern "panhandle" portion of parcel 6; these features have been subjected to substantial discharges of fill – drainage 25 has been totally filled – as a result of deep ripping and discing across these wetlands. A 103-foot-long portion of drainage 26 has been completely filled and soil is mounded along where the water in this part of the feature had flowed.

II.

CONCLUSIONS OF LAW

Conclusions of law and further findings of fact necessary to reach certain legal conclusions follow.

A.

Burden of Proof

The EPA bears the burden of proving by a preponderance of the evidence that Tsakopoulos has violated the Clean Water Act; this "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." *Concrete Pipe & Products, Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397 U.S. 358, 371-372 (1970) (Harlan, J., concurring)) (internal quotations omitted). Tsakopoulos has raised the defense of estoppel to a portion of the EPA's counterclaims. The burden of proving this defense rests upon Tsakopoulos. *See United States v. Omdahl*, 104 F.3d 1143, 1146 (9th Cir. 1997).

B.

The Clean Water Act

The Clean Water Act prohibits "the discharge of any pollutant by any person" from any "point source" into waters of the United States absent compliance with, *inter*

alia, section 1344. 33 U.S.C. §§ 1311(a), 1362(7, 12).[10] A "pollutant" is defined to include "dredged spoil, . . . , rock, [or] sand . . . discharged into water." *Id.* § 1362(6). A "point source" is a "discernible, confined and discrete conveyance," and, under the circumstances of this case, includes a plow. *Id.* § 1362(14); *see also* August 3, 1998, Order at 11-12 (citing cases).

The EPA is empowered to "prescribe such regulations as are necessary to carry out [its] functions" under the Clean Water Act. 33 U.S.C. § 1361(a). Pursuant to this authority, the agency has defined "waters of the United States" to include interstate waters and wetlands, intrastate waters and wetlands "the use, degradation, or destruction of which could affect interstate or foreign commerce," and wetlands adjacent to such waters. 40 C.F.R. § 232.2. "Wetlands" are "areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions" and generally include "swamps, marshes, bogs, and similar areas." *Id.* In the preamble to its regulations, the EPA clarified that interstate commerce would typically be affected by the destruction of waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties[, w]hich are or would be used as habitat by other migratory birds which cross State lines[,] or [w]hich are or would be used as habitat for endangered species." 53 Fed.Reg. 20,764, 20,765 (1988); *see also* 51 Fed.Reg.

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[10] Unless otherwise noted, all references herein to sections are to sections of Title 33 of the United States Code.

41,206, 41,217 (1986) (preamble to the Corps's regulations).[11]

Section 1344 allows the Corps to issue permits allowing the discharge of "dredged or fill material" into waters of the United States. 33 U.S.C. § 1344(a, d). Certain practices are exempt from section 1311(a)'s prohibition of discharges of dredged or fill material and the attendant permit requirement; these activities include "normal farming, silviculture, and ranching activities such as

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[11] The EPA further stated in its preamble that,

> if evidence reasonably indicates that isolated waters are or would be used by migratory birds or endangered species, they are covered by EPA's regulation. Of course, the clearest evidence would be evidence showing actual use in at least a portion of the waterbody. In addition, if a particular waterbody shares the characteristics of other waterbodies whose use by and value to migratory birds as [sic] well established, and those characteristics make it likely that the waterbody in question would also be used by migratory birds, it would also seem to fall clearly within the definition (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used). Endangered species are, almost by definition, rare. Therefore, in the case of endangered species, if there is no evidence of actual use of the waterbody (or similar waters in the area) by the species in question, one could actually assume that the waterbody was not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody. However, in each case a specific determination of jurisdiction would have to be made, and would turn on the particular facts.

53 Fed.Reg. 20,765.

plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." *Id.* § 1344(f)(1). However, pursuant to regulations promulgated by the EPA, this exemption is limited to "established (i.e., ongoing) farming, silviculture, or ranching operation" and not to "[a]ctivities which bring an area into farming, silviculture or ranching use" or which target an area which "has lain idle so long that modifications to the hydrological regime are necessary to resume operation." 40 C.F.R. § 232.3(c)(1)(ii)(A, B). Tsakopoulos's activities on Borden Ranch thus do not qualify for this exemption. *See* August 3, 1998, Order at 14-18.

Section 1319(b) authorizes the EPA to commence a civil action for appropriate relief, including a permanent or temporary injunction, for violations of the Clean Water Act. A civil penalty for such violations is established by section 1319(d), which provides, in pertinent part:

> Any person who violates section 1311 . . . of this title . . . shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

The civil penalty for violations occurring after January 30, 1997, has been raised to $27,500. 40 C.F.R. §§ 19.2 & 19.4; Debt Collection Improvement Act of 1996, Pub.L. 104-134, Title III, § 31001(s), 110 Stat. 1321-373 (April 26, 1996)

(codified at 28 U.S.C. § 2461 note). This Court also has jurisdiction to issue injunctive relief to "restrain [any] violation and to require compliance" with the Act. 33 U.S.C. § 1319(b). Therefore, an injunction may be issued which requires restoration, replacement, or mitigation for any damaged jurisdictional waters as may be required by equity. *United States v. Telluride Co.*, 146 F.3d 1241, 1247 (10th Cir. 1998); *United States v. Cumberland Farms of Connecticut, Inc.*, 826 F.2d 1151, 1164 (1st Cir. 1987) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982)).

The EPA seeks the imposition of a civil penalty upon Tsakopoulos and an injunction requiring restoration of the features which have been damaged and/or the creation of similar features elsewhere.

C.

Violations of the Clean Water Act

1.

Jurisdictional Features Affected

The swales and intermittent drainages enumerated by Dr. Lee as drainages 1C, 1D, 1E, 3, 4, 5, 7, 8, 9, 10, 13, 14, 15, 18, 19, 20, 23, 25, 26, 29, 30, 31, 32, 34, 35, 36, 37, 38, and 40 are "wetlands" constituting "waters of the United States" within the meaning of 40 C.F.R. § 232.2, and come within the protection of the Clean Water Act. The isolated vernal pool referred to as depression 2 was or would have been inhabited by *branchinecta lynchi*, a threatened species under the Endangered Species Act, and the destruction of this pond affected interstate commerce within the meaning of 40 C.F.R. § 232.2; therefore, this

feature also was a jurisdictional water. Tsakopoulos violated the Clean Water Act when, without a permit from the Corps, he allowed deep rippers to plow and cause fill to be deposited into these features in 1995 through 1997. He further violated the Act by allowing discing of the vernal pool.

Depressions 1, 3, 4, 5, and 6 are isolated vernal pools which have no demonstrated connection with interstate commerce. Given the relatively small size of these pools, and the lack of evidence indicating that any migratory bird or any endangered species have utilized or would utilize them as habitat, these vernal pools are not waters of the United States protected under the Clean Water Act. Therefore, Tsakopoulos did not violate the Act when he caused the deep ripper to pass through or deposit fill into these features.

2.

Estoppel Defense

Tsakopoulos argues that the EPA should be estopped from seeking recovery for any of the violations alleged to have occurred in linear features because he was told that he could drive the deep rippers over the swales and intermittent drainages with the shank raised to its uppermost position and because the government assertedly "was aware" that this would cause the blade of the shank to be dragged through the ground at a depth of six inches or more. Tsakopoulos's Trial Brief at 42-43. The elements of estoppel are "(1) the party to be estopped knows the facts, (2) he or she intends [or it is reasonably believed that he or she intends] that his or her conduct will be

acted on . . . , (3) the party invoking estoppel must be ignorant of the facts, and (4) he or she must detrimentally rely on the former's conduct." *Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir. 1998) (quoting *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995)). This defense fails for several reasons. First, when a deep ripper of the type used on the parcels at issue in this case is operated with its shank raised to the uppermost position, the blade of the shank will not drag through the ground but might occasionally tag the ground when the machine is jostled by bumps on the ground. Second, those agents of the government who instructed Tsakopoulos that the deep rippers could be driven over the swales and intermittent drainages did not believe that the blade of the shank would drag continuously through the ground. Rather, they believed, based upon the statements of Andy Johas, that the blade could be lifted completely out of the ground but could tag raised ground areas in its path. Finally, even if Johas were to have been mistaken when he told the government's agents that the shank could be lifted entirely out of the ground, it is clear that those agents relied upon that advice when they told Tsakopoulos that the deep rippers could be driven over the swales and intermittent drainages. Therefore, the defense of estoppel fails because "the party to be estopped" would not have "know[n] the facts." *Id.* at 1016.

D.

The Civil Penalty

Where there has been a violation of the Clean Water Act, the imposition of a civil penalty is "mandatory." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1397 (9th Cir.), *cert. denied*, 516 U.S. 955 (1995). However, "[d]istrict courts retain the broad discretion to set a penalty commensurate with the defendant's culpability." *Id.* Under a framework utilized by several courts, known as the "top-down method," the district court first ascertains the maximum civil penalty, and then "determine[s] if the penalty should be reduced from the maximum by reference to the statutory factors." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 573 (5th Cir. 1996) (citing *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990)); *see also United States v. Mun. Auth. of Union Township*, 150 F.3d 259, 265 (3d Cir. 1998); *Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F. Supp. 1368, 1395 (D.Haw.1993).[12] In

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[12] Another framework, known as the "bottom-up method," has been used by some courts and entails "begin[ning] with the violator's economic benefit from non-compliance . . . and then adjust[ing] up or down based on the court's evaluation of the six factors set out in [section 1319(d)]." *United States v. Smithfield Foods, Inc.*, ___ F.3d ___, ___, 1999 WL 713847, at *11 (4th Cir. Sept. 14, 1999). However, the Clean Water Act "does not require the use of either method." *Id.* at *11 n.7; *see also Mun. Auth. of Union Township*, 150 F.3d at 265 ("it appears that a court is free to use its discretion in choosing the appropriate method"). In light of the fact that, as discussed in section II.D.2.b., *infra*, determining what economic benefit Tsakopoulos derived from violating the Clean Water Act involves a relatively high amount of uncertainty, using the bottom-up method as the baseline for a

enacting section 1319(d), "Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." *Tull v. United States*, 481 U.S. 412, 422 (1987) (citing 123 CONG. REC. 39,191 (1977)).

The EPA seeks the imposition of a civil penalty of $875,000, which represents the product of multiplying 35 affected features by $25,000. Tsakopoulos argues that, if a civil penalty is to be imposed, it should not exceed $97.26 based upon the penalty imposed as part of a Consent Decree entered April 28, 1997, in *United States v. Simpson Timber Co.*, Case No. CIV. S-96-1890 LKK GGH, a case formerly pending in this United States District Court. Tsakopoulos's Trial Brief at 55 (as corrected Aug. 11, 1999); *id.* at 36 n.16 (obtaining the $97.26 figure by dividing the $30,000 penalty agreed to in *Simpson Timber* by the 987 acres of lands affected in that case, and by multiplying this per-acre amount by the 3.2 acres allegedly affected in this case).

1.

The Maximum Civil Penalty

Under section 1319(d), the maximum penalty depends upon two numbers: the number of "day[s]" the Act is violated and the number of "violation[s]" that have occurred. The EPA argues that the number of violations in this case equals the number of times that a deep ripper passed through a water of the United States plus the

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civil penalty would not be desirable. Therefore, the top-down method will be utilized in this case.

number of times that a vernal pool was disced. EPA's Trial Brief at 27 & n.6. The EPA estimates that 29 swales and intermittent drainages were passed through with a deep ripper a total of 1,100 times. *Id.* at 27-28 n.7.[13] No estimate is offered for how many violations occurred in the vernal pools. The EPA also contends that every day since these violations occurred constitutes another day to be used in calculating the maximum penalty because fill has been allowed to remain in a jurisdictional water. *Id.* at 28 (citing *United States v. Key West Towers, Inc.*, 720 F. Supp. 963 (S.D.Fla.1989), and *United States v. Ciampitti* ("*Ciampitti II*"), 669 F. Supp. 684 (D.N.J.1987)). The EPA failed to estimate the maximum civil penalty, suggesting only that the maximum penalty for all violations "is in the hundreds of millions of dollars." *Id.* at 36. Nor has Tsakopoulos attempted to identify either the number of violations, the relevant number of days, or the maximum civil penalty applicable in this case.

A "violation" within the meaning of section 1319(d) occurred whenever an unpermitted discharge took place. The Act defines a "discharge" as an "addition" of a pollutant to a jurisdictional water. 33 U.S.C. § 1362(12). The EPA's argument that merely failing to remove fill from a jurisdictional water constitutes a separate violation of the Clean Water Act is unpersuasive. Rather, the day on which a discharge occurred is the only day that

[13] This stems from the hypothesis that all of these features were crossed in one direction 25 times and that 15 of them were crossed in another direction an additional 25 times. *Id.* Therefore, the EPA estimates that, on average, each linear feature was deep ripped approximately 38 times.

will be counted in determining the maximum penalty. Further, the features which have been deep ripped involve more than one violation of the Clean Water Act because of the repeated passes by the deep rippers over these features. The parties apparently agree that each pass constitutes a separate violation. Tsakopoulos concedes that a few passes through certain features might have accidentally occurred. The evidence reveals that some of the linear features, including drainages 30 and 31, were only deep ripped a few times in localized areas. Other features were simply too small to conclude that they had been passed through with a deep ripper more than 5 to 10 times. Considering its size, the vernal pool was most likely deep ripped and/or disced approximately 10 times. On average, each of the 29 linear jurisdictional features was passed through with a fully-engaged deep ripper approximately 12 times. Each of these passes-through caused fill to be deposited into waters of the United States. Therefore, Tsakopoulos committed 358 violations of the Clean Water Act.[14] Finally, eyewitness evidence reveals that, in April of 1997, deep ripping of unspecified jurisdictional features occurred on parcel 8. However, there is insufficient evidence to establish that the witnessed activity, or any other deep ripping activity, affected any of the features listed in part II.C.1., *supra*, at any time after January 30, 1997, – the date after which the penalty for violating the Clean Water Act

[14] The total violations number is calculated by multiplying the average number of passes by a deep ripper (12) by the number of linear jurisdictional features (29), which equals 348; and then adding to this number the 10 violations in the vernal pool, which yields 358.

increased to $27,500. 40 C.F.R. § 19.2.[15] Thus the maximum penalty applicable to each of the 358 violations is $25,000. Therefore, the maximum civil penalty applicable in this case is $8,950,000.

2.

Statutory Factors

a.

The Seriousness of the Violations

The first statutory factor concerns the seriousness of the violations, their number and continuous nature. *Sierra Club, Lone Star Chapter*, 73 F.3d at 574; *Pub. Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 79 (3d Cir. 1990); *Hawaii's Thousand Friends*, 821 F. Supp. at 1395; *Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 800 F. Supp. 1, 23 (D. Del. 1992). The EPA argues that this factor weighs in favor of a significant penalty in light of the number of discharges, the duration those discharges have remained in the jurisdictional waters, and the impact deep ripping has had on the hydrological functioning of the affected linear features and on the ability of vernal pools to support endangered species. Tsakopoulos counters that, compared with the impact of the violations which were alleged in *Simpson Timber*, his violations in this case are less serious.

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[15] In its trial brief, the EPA notes the increased maximum civil penalty applicable to violations after January 30, 1997, but does not argue that any of Tsakopoulos's violations are subject to this heightened penalty.

Further, Tsakopoulos argues that the wetlands on Borden Ranch remain functional and flowing.

Tsakopoulos has not shown that the settlement reached in the *Simpson Timber* case has any relevance to the determination of an appropriate civil penalty in this case. *Simpson Timber* was resolved by a consent decree rather than through litigation and adverse judgment. Besides, Tsakopoulos focuses only on the monetary amount of the civil penalty in *Simpson Timber* and disregards the restoration measures required by the consent decree. Some of these measures created ecological preserve properties to assist in the preservation of valuable natural resources, including vernal pools. These restoration measures could have been imposed in lieu of a more significant civil penalty consistent with the objectives of the Clean Water Act.

However, Tsakopoulos correctly points out that his asserted violations of the Clean Water Act affected a relatively small area of jurisdictional waters. As Dr. Lee's findings show, the aggregate area filled by deep ripping is 2.34 acres of wetlands. This number includes approximately 0.02 acres of isolated vernal pools over which the government argued jurisdiction existed. However, the EPA's jurisdiction over these pools extends only to the one known as depression 2, which, according to Dr. Lee's testimony, covered approximately 150 square feet. Although the evidence adduced at trial pertaining to the amount of jurisdictional wetlands affected was not clear enough to ascertain the exact acreage of land adversely affected by Tsakopoulos's wrongful filling activities, it demonstrated that approximately 2 acres of jurisdictional wetlands were caused to be filled by deep ripping.

The hydrology of each of the 30 features affected has been altered significantly. Several of them – drainages 9, 10, 34, 35, 36, 37, 38, and 40 and depression 2 – are completely obliterated. Many of the remaining features have been "clipped" and/or partially filled. While the precise environmental impact these violations have had or will have on the effected [sic] wetlands is not pellucid as to some of the features, the damage attributable to these violations, including the diminished effectiveness of these features in filtering pollutants in the water system and the decrease in exotic plant and animal life, will accumulate well into the future. Dr. Lee credibly testified about these anticipated effects. Tsakopoulos's contrary contention that these features have not been significantly affected by the plowing and deep ripping activity is unpersuasive. However, considering the nature of Tsakopoulos's violations, imposition of the maximum penalty allowed under law is not required. But the nature of his deep ripping and plowing activity degraded or destroyed wetlands considered valuable by Congress and warrants a substantial civil penalty.[16]

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[16] Congress has made the following findings concerning wetlands:

> (1) wetlands play an integral role in maintaining the quality of life through material contributions to our national economy, food supply, water supply and quality, flood control, and fish, wildlife, and plant resources, and thus to the health, safety, recreation, and economic well-being of all our citizens of the Nation; (2) wetlands provide habitat essential for the breeding, spawning, nesting, migration, wintering and ultimate survival of a major portion of the migratory and resident fish and wildlife of the Nation; including migratory birds, endangered species, commercially and recreationally important finfish, shellfish and other aquatic organisms, and contain many unique species and communities of wild plants;
>
> . . . .
>
> (4) wetlands, and the fish, wildlife, and plants dependent on wetlands, provide significant recreational and commercial benefits, including – . . . (C) fishing, hunting, birdwatching, nature observation and other wetland-related recreational activities . . . ;
>
> (5) wetlands enhance the water quality and water supply of the Nation by serving as groundwater recharge areas, nutrient traps, and chemical sinks;
>
> (6) wetlands provide a natural means of flood and erosion control by retaining water during periods of high runoff, thereby protecting against loss of life and property;
>
> (7) wetlands constitute only a small percentage of the land area of the United States, are estimated to have been reduced by half in the contiguous States since the founding of our Nation, and continue to disappear by hundreds of thousands of acres each year. . . .

16 U.S.C. § 3901(a).

b.

The Economic Benefit Resulting from the Violations

The next factor concerns whether Tsakopoulos derived an economic benefit from the deep ripping activity on federal wetlands. The economic benefit flowing to a violator must be considered "to prevent [the] violator from profiting from [his] wrongdoing." *Mun. Auth. of Union Township*, 150 F.3d at 263. The goal is "to remove or

neutralize the economic incentive to violate environmental regulations." *Id.* at 264; *see also Smithfield Foods*, ___ F.3d at ___, 1999 WL 713847, at *12; *Pub. Interest Research Group of N.J.*, 913 F.2d at 80. "[T]he precise economic benefit a polluter has gained by violating [the Act] may be difficult to prove, so '[r]easonable approximations of economic benefit will suffice.' " *Smithfield Foods*, 1999 WL 713847, at *12 (quoting and altering S. REP. NO. 50, 99th Cong., 1st Sess. 25 (1985)); *see also Sierra Club, Lone Star Chapter*, 73 F.3d at 576; *Pub. Interest Research Group of N.J.*, 913 F.2d at 80. The EPA suggests that "Tsakopoulos benefitted economically in several ways as a result of proceeding with deep ripping without obtaining a permit." EPA's Trial Brief at 32. The EPA argues he avoided the cost of pursing authorization to deep rip the jurisdictional features and mitigation costs that would have been required by the government for him to receive a permit. *Id.* at 33. Second, he saved interest costs that would have accrued had he gone through with the permitting process and, resultantly, not been able to sell parcels 6, 8, 9, and 10 as quickly as he did. Third, he received profit from those sales sooner than he would have if a permit application had been properly submitted and processed. *Id.* The EPA's economics expert testified that the total economic benefit, obtained by adding these (and certain other) elements together, equals $1,039,628.[17] Also, the EPA

[17] According to the EPA's expert, from avoiding the cost of mitigation, Tsakopoulos benefitted by holding this money himself for an economic benefit of $416,687. From early sales, he benefitted $601,359; and from failing to properly flag jurisdictional wetlands on parcel 10 prior to deep ripping, he saved $21,582.

points to the tremendous profit that Tsakopoulos has earned as a result of his conversion activities on Borden Ranch. Tsakopoulos purchased parcels 6, 8, 9, and 10 for $605,323 and has since sold this land for $3,123,914. However, he incurred approximately $673,000 in land preparation, selling, interest, and other costs in the interim.[18]

Tsakopoulos argues that he has not benefitted economically at all from the violations. The properties at issue were converted for use as vineyards and then sold at a price per gross acre, rather than per farmable acre, so that there was no economic incentive to fill the wetlands, and no benefit from doing so. Tsakopoulos's Trial Brief at 54. Tsakopoulos also points out that he did expend *some* additional time and money in attempting to comply with the Clean Water Act. *Id.*

The acreage involved in these violations constitutes a minuscule fraction of the total land converted to vineyards in parcels 6, 8, 9, and 10. Therefore, deeming his profits from the sale of these parcels to be the economic benefit derived solely from his violations would not reflect the extent of his economic gain. But Tsakopoulos did save money by selling the relevant parcels earlier than he would have realized had he taken the time to comply with the Act. It is clear that he moved with

[18] Also, according to the EPA's expert, Tsakopoulos has sold half of the land on Borden Ranch for approximately $17 million, and the remaining portion is worth approximately $7.7 million. Thus, Tsakopoulos stands to make a gross profit of roughly $16.4 million from the Borden Ranch deal, without taking into account conversion, interest, and other costs.

celerity in his deep ripping activities because of the prospect of making an enormous profit, the immediate availability of this profit, and the ability to avoid expense and delay he perceived attended to action that would ensure compliance with the Clean Water Act. Thus he risked damaging rare federal wetlands because of his motivation to reap economic gain. This factor favors a substantial penalty, but the extent of the economic benefit is uncertain. Where the precise economic benefit is difficult to determine, "reasonable approximations of economic benefit will suffice." *Pub. Interest Research Group of N.J.*, 913 F.2d at 80.

c.

Any History of Such Violations

The parties dispute what should be considered when evaluating the history Tsakopoulos has had with the Act and what weight should be given to that history. Tsakopoulos's past alleged violations of the Act include those committed prior to 1993 at sites other than Borden Ranch, those committed on the Castlehill parcel in the fall of 1993, those committed on the Prudential parcel in the fall of 1994, and others committed on the Sacramento County side of Borden Ranch in 1995. Tsakopoulos points out that the AOC entered into on May 3, 1996, fully considered these violations and reached a settlement that sufficiently penalized Tsakopoulos even though he was not required to admit wrongdoing. Tsakopoulos indicates that the AOC fully required him to make amends for what occurred on the Sacramento County side of Borden

Ranch, and reflects a penalty equal to what the government was likely to have obtained had the matter been fully prosecuted instead of settled. When the EPA considered an appropriate penalty and mitigation in the AOC, and extracted from Tsakopoulos 1,368 acres of land for preserves and nearly $45,000, the EPA must have considered and intended to resolve the Sacramento County and all prior violations of the Clean Water Act (and violations of the Endangered Species Act) that Tsakopoulos had committed. While his history is problematic, the federal government dealt with it and appears to have fully considered it in the AOC. The EPA disagrees, contending that since Tsakopoulos committed further violations of the Act he "vitiated" the AOC by breaching the promise he made in the AOC that he would not engage in further violations. *See* Exh. 66 at 11. Therefore, the EPA argues that the parties' settlement reflected in the AOC should be disregarded and the Court should begin anew when considering a penalty for Tsakopoulos's current violations in light of similar violations he allegedly committed in the past.

In determining the history of all of the violations, the Court is required to consider the duration and nature of them all, "including whether the violations are perpetual or sporadic." *United States v. Smithfield Foods*, 972 F. Supp. 338, 349 (E.D.Va.1997) (citing cases), *rev'd in part on other grounds*, ___ F.3d ___, 1999 WL 713847 (4th Cir. Sept. 14, 1999). A review of the AOC, in light of the trial testimony concerning Tsakopoulos's history, reflects Tsakopoulos had problems complying with the requirements of the Clean Water Act, but leads to the conclusion that the penalty under consideration now should supplement

rather than supplant the governmental enforcement action reflected in the AOC. The AOC represents a final agency enforcement action that evinces the government utilized considerable expertise as it diligently concluded an administrative agreement with Tsakopoulos which fosters the goals of the Act. No reason has been presented justifying undoing the agreement reached in the AOC. However, Tsakopoulos's violation of the AOC itself by reneging on his assurance to comply with the Act is of historical significance and weighs in favor of a more severe penalty. Although all of Tsakopoulos's past history is considered, it is not evaluated in the light desired by the EPA.

d.

Any Good-Faith Efforts to Comply with Applicable Requirements

The next factor concerns whether Tsakopoulos made good faith efforts to comply with the Clean Water Act. This factor generally focuses on whether the violator took any actions to decrease the number of violations and whether he made an effort to mitigate the impact of his violations. *Smithfield Foods*, 972 F. Supp. at 350 (citing cases).

The EPA contends that Tsakopoulos undertook virtually no efforts to comply with the Clean Water Act and regulations promulgated thereunder, disregarded the government's warnings and "chose to go forward in San Joaquin County without a permit and in a manner that essentially assured that the rippers would impact jurisdictional waters." EPA's Trial Brief at 34, 35. The evidence

indicates that Tsakopoulos's agents utilized the deep ripping equipment almost 24 hours per day with little or no supervision at night, and in a manner which seemed impervious to the substantial risk of ripping and depositing fill into federal wetlands. These facts strongly indicate a lack of good faith.

Tsakopoulos points out that he told the government about his plans for Borden Ranch as soon as he realized he would purchase the property and there was evidence that he made some efforts to mark jurisdictional features. However, the EPA correctly asserts that Tsakopoulos repeatedly failed to adhere to the regulatory scheme and occasionally acted as though he did not recognize the authority of the Corps and the EPA in his dealings with them. And although Tsakopoulos quibbled with the Corps's enforcement authority, he knew that the Corps had clearly directed him not to deep-rip federal wetlands. However, the evidence does reveal that Tsakopoulos apparently intended to avoid the necessity of obtaining a permit on parcels 6, 8, 9, and 10 by avoiding deep ripping jurisdictional waters therein. He sought and received the government's guidance regarding what activities he could undertake without a permit. While certain federal officials apparently anticipated that he would submit permit applications for these parcels before he deep ripped them it is unclear why he would need a permit if he intended to avoid jurisdictional waters.

Yet the evidence reveals that Tsakopoulos expended little effort to comply with the Act prior to the summer of 1996. It is undisputed there was deep ripping taking place on parcels 6 and 10 prior to the preparation and verification of a jurisdictional wetlands delineation map,

which did not take place until the spring and summer of that year. Final Pretrial Order filed May 27, 1999, ("the Final Pretrial Order") at 4-5. Without such a map, it is unclear how Tsakopoulos's agents could successfully avoid all jurisdictional features. The evidence further shows that in September of 1996 some flagging and staking was done on the San Joaquin County side, particularly around vernal pools. Nevertheless, deep ripping of jurisdictional features still occurred. Tsakopoulos testified that he relied upon his agents to ensure compliance with the government's guidance regarding driving over the swales and intermittent drainages. But these agents had an unvigilant attitude towards compliance with the Clean Water Act on Borden Ranch. Finally, between September of 1994 and September of 1996, Tsakopoulos deliberately obfuscated his understanding of the Corps's guidance respecting driving over vernal pools and undermined the Corps's enforcement authority by wrongly stating the agency gave him confusing guidance as to the nature of the contact he could have with jurisdictional waters. He knew he was not authorized to deep rip any jurisdictional features.[19] These findings weigh against good faith. While confusion did exist as to whether Tsakopoulos needed a permit prior to deep ripping outside jurisdictional features, Tsakopoulos understood his responsibility

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[19] The government's internal discussions about the extent of its authority under the Clean Water Act, and the portion of that debate that surfaced at one of Tsakopoulos's meetings with federal officials, are irrelevant since Tsakopoulos knew that the Corps's direction to him about his activities on jurisdictional waters was clear and consistent.

to avoid federal jurisdictional features as early as September of 1994. Yet some of his agents failed to avoid those features. For instance, the evidence demonstrates that there was no serious effort to avoid waters of the United States when deep rippers plowed nearly all of parcel 10. This is indicative of the absence of a good faith attempt to comply with the Act. This factor favors the imposition of a significant civil penalty.

e.

The Economic Impact of the Penalty on the Violator

Another factor concerns the economic impact a civil penalty would have on Tsakopoulos. However, he has entered into a stipulation with the EPA, filed under seal March 12, 1999, wherein he agrees in substance that the economic impact of a penalty on him need not be considered in determining whether the civil penalty imposed should depart from the maximum allowed under the Clean Water Act. Further, in the Final Pretrial Order, Tsakopoulos agreed that he "has the financial resources to respond to any judgment which the Court may make." *Id.* at 21. Therefore, this factor does not affect the severity of the penalty.

f.

Other Matters Required by Justice

Further, section 1319(d) requires consideration of "such other matters as justice may require" in fashioning a civil penalty. The EPA argues that this Court ought to consider the need to deter "the regulated community"

from violating the Clean Water Act through the imposition of a severe civil penalty. EPA's Trial Brief at 36. Otherwise, the EPA argues, the government's regulatory program could be subverted. Tsakopoulos does not dispute these contentions. This factor is relevant and does weigh in favor of the imposition of a more severe civil penalty. *See United States v. Mun. Auth. of Union Township*, 929 F. Supp. 800, 809 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3d Cir. 1998).

No other matter is asserted to be, or appears to be, pertinent to this determination. Consequently, the amount of the civil penalty is determined.

3.

The Amount of the Civil Penalty

Although the maximum civil penalty under the statute is $8,950,000, the EPA seeks a lesser penalty, and injunctive relief that would require Tsakopoulos to make appropriate restoration for depriving the United States government and its people of wetlands. The EPA's approach bespeaks that public policy interests will be served best by restoration on Borden Ranch and/or other properties owned by Tsakopoulos. This would foster the congressional goal of protecting federal wetlands. "Congress has determined that 'the . . . destruction of the Nation's wetlands is causing [such] serious, permanent ecological damage,' . . . that wetlands merit protection by laws. . . . " *United States v. Larkins*, 657 F. Supp. 76, 86 (W.D. Ky. 1987) (quoting STAFF OF SENATE COMM. ON THE ENVIRONMENT, 95TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, 869-70 (Comm. Print

1978)). The issue is what monetary legal penalty should be imposed and whether Tsakopoulos could avoid any portion of that penalty by restoring damaged or destroyed wetlands. On balance, the statutory factors dictate that Tsakopoulos either must pay a stiff civil penalty or make appropriate restoration for depriving the nation of wetlands that support wildlife and endangered species. This is consistent with the EPA's policy of accepting "consent decree provisions which allow the reduction of a civil penalty assessment in recognition of the defendant's undertaking an environmentally beneficial 'mitigation project.' " *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1354 n.6 (9th Cir. 1990) (quoting the EPA's "Clean Water Act Penalty Policy for Civil Settlement Negotiations" (1986)).

The relative seriousness of Tsakopoulos's violations and his lack of earnest effort to comply with the Act merit a significant penalty in order to achieve appropriate retribution. Tsakopoulos realized his obligation to ensure his agents avoided deep ripping federal wetlands but failed to devise a ripping operation sufficient to avoid these jurisdictional features. The plan developed created a plain and obvious risk that others would rip these features because it authorized ripping to occur almost continuously without enough supervision, and even in the wee hours of the morning and night. The haste involved in this ripping activity was driven by a profit motive – to make parcels of Borden Ranch conducive for vineyards so that sales of the properties could be consummated. The economic benefit Tsakopoulos obtained from his haste enabled him to realize a quicker sale of deep ripped

property, which included deep ripped jurisdictional wetlands. Reaping such benefits at the expense of damaging rare federal wetlands is intolerable under the Act and preponderates toward a significant penalty to achieve the goal of deterrence.

On balance, all the considered factors warrant imposition of a civil penalty pursuant to 33 U.S.C. § 1319(d). Tsakopoulos is fined $1,500,000 for his 358 violations of the Clean Water Act. However, Tsakopoulos may suspend payment of $1,000,000 of this penalty and reduce it to $500,000 if he completes the restoration measures identified in the injunctive relief portion of this Order. If Tsakopoulos elects to undertake such restoration measures, he must file a written notice so stating within 30 days of the date on which this Order is filed.

E.

Injunctive Relief

The restoration measures favored by the EPA are given considerable deference because of its expertise in achieving the goals of the Clean Water Act. However, to institute those measures Tsakopoulos would have to cooperate with the involved federal agencies. Although it appears that the cost of the restoration sought is significantly less than the $1,000,000 civil penalty which will be held in abeyance should Tsakopoulos elect to do the restoration,[20] reducing the penalty in favor of restoration

[20] If Tsakopoulos does not elect to do the restoration this civil penalty could be used by the EPA to do restoration itself elsewhere.

would be instified under the reasoning that Tsakopoulos's election to do the restoration bears upon the necessity of a civil penalty. *Ciampitti II*, 669 F. Supp. at 686-87. Should Tsakopoulos voluntarily elect to cooperate with these agencies, that would indicate his good intention to improve the damage that he allowed his agents to cause to jurisdictional features of the United States. As observed by the Court in *United States v. Ciampitti*, 615 F. Supp. 116, 125 (D.N.J. 1984), Tsakopoulos's "good faith in preparing and implementing a restoration plan is a relevant factor in assessing the size or necessity of civil penalties."

Accordingly, if Tsakopoulos makes the election to have $1,000,000 of the imposed civil penalty held in abeyance pending determination of whether he has made such restoration, he shall cooperate with the EPA and the Corps in arranging for the preparation of a restoration plan covering at least four acres in and near Goose Creek, Dry Creek, and/or on other appropriate areas on property owned by Tsakopoulos ("the applicable land").[21] Four acres is approximately twice the acreage directly affected by his unlawful deep ripping activities. In light of the indirect impact that violations like those committed by Tsakopoulos have on jurisdictional waters downstream, the EPA's policy is to require restoration at a two-to-one ratio. *See* EPA's Trial Brief at 39. Tsakopoulos does not dispute that, if he had applied for a permit to deep rip the 30 jurisdictional features, he would have been required to undertake restoration of an area determined by using this ratio. Therefore, mitigation on four acres of

[21] The EPA must agree to the site selected for restoration.

wetlands is appropriate. The restoration plan will be prepared by an independent environmental consulting firm selected by the EPA and will be subject to EPA approval. Tsakopoulos shall cooperate in the development of this restoration plan by (i) providing access to the applicable land, and (ii) reimbursing the environmental consultant selected by the EPA for the cost of developing the mitigation plan, and (iii) assisting the United States in implementing this plan.[22] To serve the goals of restoration, this activity may include fill removal, creation of buffers, installation of culverts to channel water flow, and revegetation.

III.

CONCLUSION

For the above-stated reasons, the Court finds that Angelo K. Tsakopoulos committed three hundred fifty-eight (358) violations of the Clean Water Act when he caused fill to be discharged into waters of the United States on parcels 6, 8, 9, and 10 of Borden Ranch. A civil penalty pursuant to 33 U.S.C. § 1319(d) is imposed in the amount of one million five hundred thousand dollars ($1,500,000). If Tsakopoulos files a notice that he elects to have held in abeyance his obligation to pay one million dollars ($1,000,000) of the civil penalty within thirty (30) days of the date this Order is filed, then the EPA shall file

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[22] The restoration work should be performed by an independent firm selected by the EPA. Tsakopoulos shall cooperate in providing access to the applicable land and shall pay the costs for implementing the mitigation plan.

a proposed injunction which encompasses the relief described in its Trial Brief and section II.E., *supra*, within sixty (60) days of the date this Order is filed; a Judgment would then be entered imposing a five hundred thousand dollar ($500,000) civil penalty and an injunction requiring restoration. If the restoration is not thereafter completed as Ordered, the EPA may file a motion seeking appropriate relief, which may include the re-imposition of all or part of that portion of the civil penalty which was held in abeyance. However, if Tsakopoulos does not timely elect to undertake the restoration, a Judgment will be entered imposing the full one million five hundred thousand dollar ($1,500,000) civil penalty.

IT IS SO ORDERED.

DATED: November 8, 1999

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BORDEN RANCH PARTNERSHIP and ANGELO K. TSAKOPOULOS, Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	)	CIV. S-97-0858 GEB JFM
	)	ORDER*
	)	(Filed Feb. 10, 2000)
And Related Counterclaim.	)	

Plaintiff-Counter-defendant Angelo K. Tsakopoulos ("Tsakopoulos") moves to amend the findings set forth in the November 8, 1999, Findings of Fact and Conclusions of Law ("Findings and Conclusions") pursuant to Rule 52(b) of the Federal Rules of Civil Procedure.[1] Defendant-Counterclaimant United States Environmental Protection

* This case was determined to be suitable for decision without oral argument. L.R. 78-230(h).

[1] Unless otherwise indicated, all references herein to Rules are to the Federal Rules of Civil Procedure.

Agency ("the EPA") opposes the motions.[2] For the reasons set forth below, the motions are denied.

Rule 52(a) "requires findings of fact in judge tried actions. The purpose of this rule is so appellate courts may have a clear understanding of the basis of the decision." *Weyerhaeuser Co. v. Atropos Island*, 777 F.2d 1344, 1352 (9th Cir. 1985) (internal quotation marks and citation omitted). A district judge should state "the preliminary and basic facts" on which his decision rests. *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1444 (9th Cir. 1985) (quoting *Dalehite v. United States*, 346 U.S. 15, 24 n.8 (1953)). Rule 52(b) provides that, on motion, "the court may amend" findings pursuant to Rule 52(a), "or make additional findings." "Motions under Rule 52(b) are primarily designed to correct findings of fact which are central to the ultimate decision; the Rule is not intended to serve as a vehicle for a rehearing." *Davis v. Mathews*, 450 F. Supp. 308, 318 (E.D. Cal. 1978); *accord* 9 Moore's Federal Practice 3d § 52.60[s] (1999).

Tsakopoulos argues that certain more specific findings are required "to sufficiently and precisely indicate and afford a clear understanding of the factual bases and grounds for the Court's ultimate conclusions and decision in this matter." Plaintiff's Memorandum of Points and Authorities ("Pltf. Mem.") at 1-2. First, Tsakopoulos requests specification of the precise depths at which the deep ripper shanks were dragged through jurisdictional features in violation of the Clean Water Act. *Id.* at 3-4.

[2] Tsakopoulos has filed two motions for more specific findings: one on December 2, 1999, and a supplemental motion on December 8, 1999. Both are resolved by this Order.

Since Tsakopoulos fails to articulate the relevance of these precise depths, this aspect of the motion is denied. Second, Tsakopoulos seeks particularization of the following facts assertedly relevant to his estoppel defense: (i) the "circumstances, location and type of [deep ripping] equipment" which a certain EPA witness had observed with its shanks in the uppermost position, (ii) to which government agents Tsakopoulos and/or his agent had represented that the deep ripper shanks could be raised completely out of the ground, (iii) which specific statements constituted these representations, and (iv) what "specific actions" government agents had undertaken in reliance upon these statements. *Id.* at 4-5. However, the Findings and Conclusions sufficiently set forth the facts which support the conclusion that Tsakopoulos's estoppel defense had not been proven, *see* Findings and Conclusions at 7, 17, 30, and Tsakopoulos has not shown how further detail would be pertinent. Third, Tsakopoulos asks for clarification of certain facts regarding the existence of endangered species in depression 2 which was found to have been plowed in violation of the Clean Water Act. He seeks specification of (i) whether the Court found that depression 2 was a "hydrologically-isolated vernal pool," (ii) whether the Court found any "actual . . . presence" of endangered species in the feature and/or whether the feature was an "*actual* or *potential*" habitat for such species, (iii) the "historical frequency and duration" of spillage from a proximate vernal pool, (iv) over what distance this spillage was found to occur, (v) whether endangered species are capable of surviving transportation from one vernal pool to another via overland storm water flow, and (vi) whether

depression 2 had specific physical characteristics which made it a viable habitat for endangered species. Pltf. Mem. at 5-6. The findings regarding depression 2 are sufficiently set forth in the Findings and Conclusions and patently incorporate some of the additional findings which Tsakopoulos now seeks. *See* Findings and Conclusions at 20-21. In any event, Tsakopoulos has failed to show how more detail would be necessary and/or relevant to the factual finding that depression 2 had more likely than not served as a habitat for a certain endangered species. *Id.* at 21. Therefore, this aspect of Tsakopoulos's motion is denied.

Tsakopoulos next seeks clarification of the precise acreage and the widths of each linear feature into which fill was deposited by his deep ripping activities. Pltf. Mem. at 6. However, the Court previously expressed that "the evidence adduced at trial pertaining to the amount of jurisdictional wetlands affected was not clear enough to ascertain the exact acreage of land adversely affected." Findings and Conclusions at 36. Further, Tsakopoulos has not shown how more specificity is necessary or would be relevant. Tsakopoulos also seeks a specific finding of the "reasonably approximate amount" of the economic benefit he derived from violating the Clean Water Act. Pltf. Mem. at 6-7. As Tsakopoulos notes, the Court found that a "relatively high amount of uncertainty" was involved in the calculation of economic benefit in this case. *Id.* at 6 (citing Findings and Conclusions at 31 n.12). Further, as was explained in the Findings and Conclusions, precise numbers are unnecessary. *See* Findings and Conclusions at 38, 40. The EPA's unrebutted expert testimony that Tsakopoulos benefited approximately $1 million was

based upon facts which Tsakopoulos has not disputed, and these facts are set forth sufficiently in the Findings and Conclusions. *Id.* at 38-39 & n.17. Therefore, this aspect of the motion is denied. Tsakopoulos also requests that the Findings and Conclusions be made more specific regarding how he "depriv[ed] the nation of wetlands that support wildlife and endangered species" and why the Court concluded his violations were relatively serious. *Id.* at 46. Since he has failed to demonstrate the necessity for further explanation of these findings than was stated in the Findings and Conclusions, this aspect of the motion is also denied.

Finally, in Tsakopoulos's supplemental motion, he seeks clarification of the phrase "independent environmental consulting firm." *Id.* at 49. Since that phrase has been adequately clarified in an Order filed December 17, 1999, the supplemental motion is moot.

For the reasons stated, Tsakopoulos's motions for more specific findings are denied.

IT IS SO ORDERED.

DATED: February ___, 2000

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BORDEN RANCH PARTNERSHIP, et al., Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, et al., Defendants.	CIV. S-97-0858 GEB JFM FINAL ORDER (Filed March 3, 2000)
And Related Actions.	

On February 28, 2000, the parties jointly submitted a [Proposed] Final Judgment to which both sides have assented. Because the proposed judgment satisfies the directives set forth in the February 14, 2000, Order, the stipulated conditions set forth in the [Proposed] Final Judgment will issue as part of this Final Order, with one change described below.

The parties propose the issuance of a permanent injunction which proscribes Tsakopoulos "from engaging in any activity associated with rangeland conversion on the Borden Ranch, including deep ripping and discing, which results in the discharge from a point source of fill or dredged material into jurisdictional waters of the United States unless he has first obtained a permit under

the Clean Water Act authorizing such discharge." [Proposed] Final Judgment, ¶ 12. This proposal for a permanent injunction is rejected because the factors which the Court must consider in deciding whether to grant a permanent injunction do not favor the issuance of such an injunction. *See* Fed. R. Civ. P. 65(d); *United States v. Laerdal Manuf. Corp.*, 73 F.2d 852, 854-55 (9th Cir. 1995) (setting out factors); *Federal Election Comm'n v. Furgatch*, 869 F.2d 1256, 1262-64 (9th Cir. 1989) (same).

"[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 193 (1978)). Further, an injunction is not the only means of ensuring compliance with the Clean Water Act. *Id.* at 314-15 (noting the availability of fines and criminal penalties). "Under [33 U.S.C.] § 1365(a), the district court has discretion to determine which form of relief is best suited, in the particular case, to abate current violations [of the Clean Water Act] and deter future ones." *Friends of Earth, Inc. v. Laidlaw Envtl. Services*, ___ U.S. ___, 120 S. Ct. 693, 699 (2000). An award of civil penalties premised in part upon the need for deterrence coupled with appropriate restoration may satisfactorily deter the risk of future violations. *See id.* ("[A] district court in a Clean Water Act citizen suit properly may conclude that an injunction would be an excessively intrusive remedy, because it could entail continuing superintendence of the permit holder's activities by a federal court – a process burdensome to court and permit holder alike."); *Nat'l Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992) ("Injunctive relief may

be inappropriate where it requires constant supervision."). In the Findings of Fact and Conclusions of Law, it was found that a $1.5 million civil penalty, or the combination of a $500,000 penalty and complete restoration of the wetlands damaged by Tsakopoulos's operations, would serve to adequately remedy the government for his violations of the Clean Water Act. The restorative injunction obviates the need for imposition of an additional injunction since it fosters the important federal interests involved. Since there has been no showing that further active management by the Court is required to achieve those interests, the Court declines to impose an additional injunction. Therefore, a permanent injunction will not issue.[1]

Accordingly, as agreed in the stipulated [Proposed] Final Judgment:

Civil Penalty

1. Tsakopoulos shall pay a civil penalty of $500,000 pursuant to 33 U.S.C. § 1319(d) as a consequence of his violations of the Clean Water Act on the San Joaquin County portion of the Borden Ranch during the period 1995 to 1997. This payment shall be made to the United States Treasury.

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[1] Tsakopoulos's request that the Final Order should dissolve the preliminary injunction entered October 20, 1997, is unnecessary. That injunction expires by its own terms upon the "resolution of the parties' action" – *i.e.*, with the forthcoming entry of Judgment.

Mitigation

2. Tsakopoulos shall cooperate with the Environmental Protection Agency ("EPA") and the Corps of Engineers in arranging for the preparation and implementation of a restoration plan providing for the creation or restoration of at least four acres of wetlands or other waters of the United States in and near Goose Creek, Dry Creek, or other areas owned by Tsakopoulos. Wetlands which cannot be restored to their prior condition should be replaced.

3. The restoration plan shall identify the goals of the restoration project, designate the areas to be affected, specify the activities to be completed, establish a timeline for the work, establish criteria for determining when the mitigation has been successful, provide for regular on-site monitoring and reporting, identify contingency measures in the event the initial efforts are not successful, estimate the cost of the project, and address such other mitigation issues as EPA deems necessary. Fill removal, creation of buffers, installation of culverts, and revegetation are among the activities that may be included in the restoration plan. The restoration plan shall also specify the steps reasonably required to be taken by Tsakopoulos in connection with implementation of the mitigation project, including any obligations to obtain further permits or to impose deed restrictions with respect to the applicable land, access to the applicable land, protection of the water sources necessary for mitigation, and the provision of information pertinent to the plan.

4. The restoration plan shall be prepared and implemented by an environmental consulting firm selected by EPA and acting under direction from EPA.

5. Tsakopoulos shall upon request provide EPA, the Corps, the designated consulting firm, and their representatives access to his Borden Ranch or other properties for purposes relating to development and implementation of the restoration plan. Tsakopoulos shall also make good faith effort to secure access to portions of the Borden Ranch or other properties selected for the restoration work no longer owned by him if such access is requested by EPA, the Corps, or the environmental consultant, for purposes relating to development and implementation of the plan.

6. Tsakopoulos shall reimburse the designated environmental consultant on a timely basis (within 30 days after receipt of monthly statements) for the fees, expenses, and other costs, including any subcontractor costs, associated with preparation and implementation of the restoration plan.

7. Tsakopoulos shall be provided the opportunity to comment on the restoration plan (and any necessary supplements or amendments thereto) as it is being implemented. However, the requirements of the restoration plan, and the manner and timing of its implementation, shall be determined by EPA, based on the recommendations of the environmental consultant and the Corps.

8. The final restoration plan must be approved by EPA before implementation. Within 30 days after approving the restoration plan, EPA shall provide a copy to

Tsakopoulos. Any subsequent amendments or supplements to the restoration plan shall be necessary to the proper completion of the proposed restoration and shall be provided to Tsakopoulos within 30 days after they have been approved by EPA.

9. EPA, in consultation with the Corps and the selected environmental consultant, shall be provided the opportunity to observe on-site construction activities and monitor the implementation of the restoration plan. This shall include periodic on-site inspection of the restoration activities and their impact.

10. EPA, in consultation with the Corps and the selected environmental consultant, shall determine when the requirements of the restoration plan have been fulfilled. Within 30 days after making such a determination, EPA shall notify Tsakopoulos in writing that EPA believes his restoration obligations have been satisfied. The Court retains continuing jurisdiction to resolve any disputes in this area.

11. If Tsakopoulos fails to comply in full with the foregoing provisions requiring restoration, EPA may seek appropriate relief from this Court. Such relief may include completion of the restoration plan or re-imposition of all or part of the potential $1 million in civil penalties referred to in the Findings of Fact and Conclusions of Law dated November 8, 1999. The Court retains continuing jurisdiction to resolve disputes concerning compliance with this injunction at either party's request.

Final Dismissal of Tsakopoulos's Affirmative Claims

12. Pursuant to this Court's Order filed June 9, 1998, as amended August 3, 1998, final judgment shall be entered in favor of defendants United States Army Corps of Engineers and United States Environmental Protection Agency on the claims asserted against them in this action by Borden Ranch Partnership and Angelo K. Tsakopoulos, and such claims are hereby finally dismissed.

The Clerk is directed to enter a Judgment in accordance with this Final Order, pursuant to Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

DATED: March 2, 2000

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

BORDEN RANCH PARTNERSHIP

v. CASE NUMBER: CIV S-97-858 GEB JFM

UNITED STATES ARMY CORPS OR [sic] ENGINEERS

(Filed Mar. 3, 2000)

XX – **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF March 3, 2000.

Jack L. Wagner,
Clerk of the Court

ENTERED: March 3, 2000

by: /s/ K Carlos
K Carlos, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANGELO K. TSAKOPOULOS, Plaintiff, v. AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, et al., Defendants.	CIV. S-99-0853 GEB JFM
And Related Counterclaims.	ORDER* (Filed Aug. 9, 2000)

Plaintiff ("Tsakopoulos") moves for partial summary judgment against each Defendant and Defendants cross-move for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons that follow, Tsakopoulos's motions are granted in part and denied in part, the motion of Defendants American Manufacturers Mutual Insurance Company ("AMMIC") and Lumbermens Mutual Casualty Company ("LMCC") is granted in part and denied in part, and the motion of Defendant Reliance Insurance Company ("Reliance") is granted in part and denied in part.

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* This case was determined to be suitable for decision without oral argument. L.R. 78-230(h).

I.

BACKGROUND

Tsakopoulos claims breach of contract and breach of the implied covenant of good faith and fair dealing against AMMIC, LMCC, and Reliance arising out of their declining to defend Tsakopoulos in certain litigation with the United States Environmental Protection Agency ("EPA") or to indemnify him for a certain aspect of the March 3, 2000, judgment entered therein ("Judgment").[1] Tsakopoulos seeks compensatory damages, declaratory relief, attorney's fees and costs. AMMIC, LMCC, and Reliance counterclaim for declaratory relief.

The following material facts are not in dispute. In 1993, Tsakopoulos purchased a property ("Borden Ranch") comprising 8,348 acres at the border between Sacramento and San Joaquin counties. Between late 1993 through late 1997, Tsakopoulos caused various portions of Borden Ranch to be plowed by his agents and/or employees primarily to convert the land for use as vineyards. In May of 1997, he and Borden Ranch Partnership ("Partnership"), of which he is the managing partner, commenced a federal civil action against the United States Army Corps of Engineers and the EPA seeking, *inter alia*, a judgment declaring that Tsakopoulos and the Partnership were not required to obtain permits pursuant to the Clean Water Act ("CWA"), 33 U.S.C. § 1344, to engage in certain plowing activities at Borden Ranch. As

[1] As discussed infra, Reliance actually funded Tsakopoulos's defense, but did so under a reservation of rights. Reliance seeks a judgment declaring that it was not obligated to defend Tsakopoulos.

part of its August 6, 1997, Answer, the EPA advanced a counterclaim ("Counterclaim") against Tsakopoulos alleging that, beginning sometime in November of 1994, he had violated the Clean Water Act during his plowing activities on certain portions of Borden Ranch by causing dredged or fill material to be discharged into waters of the United States. Specifically, the Counterclaim alleged that the soil discharged into jurisdictional waters as a result of Tsakopoulos's plowing constituted a "pollutant" within the meaning of the CWA.[2] Both sides thereafter filed motions for summary judgment concerning, *inter alia*, whether soil is a pollutant within the meaning of the CWA; the August 3, 1998, Amended Order held that any dredged or fill material discharged into waters of the United States resulting from plowing would constitute the discharge of a "pollutant" under the CWA.

On October 5, 1998, Tsakopoulos tendered the defense of the Counterclaim to Reliance, which had issued Tsakopoulos a comprehensive general liability ("CGL") insurance policy effective through July 15, 1997. By December 28, 1998, Tsakopoulos had received no decision from Reliance; on that date he tendered the defense of the Counterclaim to AMMIC and LMCC, which had issued him CGL insurance and excessive coverage policies which went into effect on July 16, 1997. In a letter dated March 18, 1999, AMMIC and LMCC rejected

[2] The CWA defines the term "pollutant" to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

Tsakopoulos's tender on the ground that their policies exclude coverage for certain pollution damages and that the Counterclaim sought civil penalties and injunctive relief, which are not covered under the terms of their policies. But Reliance conditionally accepted his tender of defense on or about April 28, 1999, subject to a reservation of rights. Reliance has paid Tsakopoulos's costs defending the Counterclaim, including attorney's fees, incurred since the date of tender.[3]

A bench trial on the Counterclaim was held in August and September of 1999. Thereafter, Tsakopoulos was found to have caused 358 violations of the CWA during plowing activities on specified portions of Borden Ranch. *Borden Ranch Partnership v. United States Army Corps of Engineers*, CIV. S-97-0858 GEB JFM ("*Borden Ranch*"), Findings of Fact and Conclusions of Law filed November 8, 1999 ("Findings and Conclusions") at 34.[4] Tsakopoulos and/or his agents were found to have "utilized [certain plowing equipment] almost 24 hours per day with little or no supervision at night, and in a manner which seemed impervious to the substantial risk of ripping and depositing fill into federal wetlands. . . . Tsakopoulos apparently intended to avoid the necessity of obtaining a permit on [the subject parcels] by avoiding deep ripping jurisdictional waters therein. . . . [But he]

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[3] Through the time the Judgment was entered, the defense expenses which Reliance has paid total approximately $1.2 million.

[4] Judicial notice of the Findings and Conclusions is taken pursuant to the parties' requests and Federal Rule of Evidence 201.

expended little effort to comply with the [CWA] prior to the summer of 1996. . . . [For example,] there was no serious effort to avoid waters of the United States when deep rippers plowed nearly all of [a certain parcel prior to the summer of 1996]." *Id.* at 43-44. Further, "Tsakopoulos realized his obligation to ensure his agents avoided deep ripping federal wetlands but failed to devise a ripping operation sufficient to avoid those jurisdictional features. The plan developed created a plain and obvious risk that others would rip these features because it authorized ripping to occur almost continuously without enough supervision, and even in the wee hours of the morning and night." *Id.* at 46-47. Tsakopoulos was fined $1.5 million under CWA's civil penalty provision. 33 U.S.C. § 1319(d). However, the Findings and Conclusions further held that $1 million of this fine would be held in abeyance if Tsakopoulos would consent to the entry of injunctive relief requiring him to remedy the violations in cooperation with the government and in accordance with a restoration plan to be developed by an independent environmental consulting firm. *Id.* at 47-49. Tsakopoulos, elected to undertake the restoration. Therefore, the subsequent Judgment incorporated a restorative injunction which required him to cooperate and arrange for the preparation and implementation by an environmental consultant of a restoration plan involving the creation or remediation of at least four acres of wetlands or other waters of the United States. Final Order filed March 3, 2000, at 4.[5] Tsakopoulos is required to reimburse the environmental consultant for

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[5] Tsakopoulos has appealed from the Judgment.

its costs and expenses in preparing and implementing the plan. *Id.* at 5.

II.

DUTY TO DEFEND

The parties agree that California law governs the subject insurance policies. Under California law, "a liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity. . . . [T]he carrier must defend a suit which potentially seeks damages within the coverage of the policy. . . . Implicit in this rule is the principle that the duty to defend is broader than the duty to indemnify. . . . " *Standun, Inc. v. Fireman's Fund Ins. Co.*, 62 Cal. App. 4th 882, 888 (1998) (internal quotation marks and citations omitted). "[T]he duty to defend should be fixed by the facts which the insurer learns from the language of the insurance policy and the allegations in the complaint], the insured, or other sources. An insurer, therefore, bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 276-77 (1966). "To prevail . . . on the issue of duty to defend, the insured must prove the existence of a-potential for coverage, while the insurer must establish the absence of any such potential. 'In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.' " *Standun*, 62 Cal. App. 4th at 888-89 (quoting *Montrose Chemical Corp. of California v. Superior Court (Canadian Universal Ins. Co.)*, 6 Cal. 4th 287, 300 (1993)).

Tsakopoulos seeks a declaration that each Defendant was and is obligated to defend him on the Counterclaim and summary adjudication on the issue of AMMIC's and LMCC's liability for breach of contract. Defendants argue that they had no duty to defend Tsakopoulos on the Counterclaim because (i) the alleged discharges did not constitute an "occurrence" within the meaning of the policies, (ii) the Counterclaim did not seek "damages" within the meaning of the policies, and (iii) the Counterclaim arose out of damage caused by "pollutants" within the meaning of the "total pollution exclusions" in the policies. LMCC contends it had no duty to defend Tsakopoulos because his primary insurance coverage had not been exhausted. These contentions are addressed *seriatim*.[6]

A.

"Occurrence" / Expected or Intended Damages

Each of the insurance policies at issue sets forth that it only covers damages arising out of an "occurrence," which is defined as an "accident"; damages which are "intended" or "expected" by the insured are excluded from coverage.[7] Defendants submit no evidence demonstrating that Tsakopoulos subjectively "expected or

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[6] Since both sides have filed cross motions for summary adjudication as to Tsakopoulos's duty-to-defend claim, and certain other issues in this lawsuit, the ordinary implication is, and the parties agree, that no disputed issues of material fact exist as to these issues and that the disputes over these issues may be decided a matter of law. *See A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1417 n.1 (9th Cir. 1986).

[7] In each of the subject policies, "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general hazardous conditions." Each

intended" the discharges. *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 746-47 (1993) (holding that the term "expected" means that the insured subjectively knew or believed an event would occur); *Meyer v. Pacific Employers Ins. Co.*, 233 Cal. App. 2d 321, 326 (1965) ("We approach the question as to whether damage to plaintiffs' property was accidental from the standpoint as to whether it was unexpected by the insured."). To show that Tsakopoulos "expected" the plowing activities would cause discharge into jurisdictional waters, Defendants must show that he " 'knew or believed [his conduct] was substantially certain or highly likely to result' in harm to the [government]." *Smith v. Hughes Aircraft Co.*, 22 F.3d 1432, 1439 (9th Cir. 1994) (quoting *Shell Oil Co.*, 12 Cal. App. 4th at 748). Defendants have failed to adduce evidence sufficient to meet this standard. Rather, they contend that they had no duty to defend the Counterclaim because "[t]here was nothing 'accidental' about the property damage that the EPA alleged in its counterclaim. . . . The claims for which [Tsakopoulos] seeks coverage did not arise from any 'accidental' property damage. Rather, the underlying claims arose from [his] pursuit of development activities without obtaining the necessary permits." Reliance's Memorandum of Points and Authorities filed June 1, 2000, at 19-20; *see also* AMMIC's & LMCC's Reply filed June 23, 2000, at 13 ("[A]ny alleged 'property

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policy also excludes coverage of liability for " 'bodily injury' or 'property damage' expected or intended from the standpoint of the insured." Under California law, "[e]xpected and intended injuries or damage are not accidents," so analyses of these provisions necessarily overlap. *Collin v. American Empire Ins. Co.*, 21 Cal. App. 4th 787, 805 (1994).

damage' is not the result of an accident, but rather, is the result of a deliberate effort to 'deep plow' Borden Ranch to prepare it for cultivation of deep root crops."). But under California law "coverage is not always precluded merely because the insured acted intentionally and the victim was injured. . . . [A]n 'accident' exists when any aspect of the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity." *Merced Mutual Ins. Co. v. Mendez*, 213 Cal. App. 3d 41, 50 (1989).[8] The fact that Tsakopoulos intended that Borden Ranch be plowed generally does not mean that he intended to discharge soil into jurisdictional waters. Further, the Counterclaim did not allege that Tsakopoulos acted intentionally to discharge fill or dredged material into jurisdictional waters; the CWA imposes liability for unpermitted discharges on a strict-liability basis. 33 U.S.C. § 1311(a); *United States v. Pozsgai*, 999 F.2d 719, 725 (3d Cir. 1993); *United States v. Winchester Municipal Utilities*, 944 F.2d 301, 304 (6th Cir. 1991). Even assuming that, at the time they declined coverage, Defendants were aware of all the facts eventually proven at trial,[9] these facts would not establish that Tsakopoulos

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[8] "The following is illustrative. When a driver intentionally speeds and, as a result, negligently hits another car, the speeding would be an intentional act. However, the act directly responsible for the injury – hitting the car – was not intended by the driver and was fortuitous. Accordingly, the occurrence resulting in injury would be deemed an accident." *Merced Mutual Ins.*, 213 Cal. App. 3d at 50.

[9] Defendants' arguments fail to specify upon what information they based their decisions whether to defend on the Counterclaim. "In determining whether a duty to defend exists, courts look to all the facts available to the insurer at the time the

intentionally caused fill or dredged material to be discharged into jurisdictional waters. As Defendants concede, Tsakopoulos was found to have made efforts, albeit unsuccessfully, to avoid jurisdictional waters so that he could avoid the necessity of obtaining a permit from the government. Therefore, Defendants have not shown that the CWA violations claimed in the Counterclaim and demonstrated by the evidence were not an occurrence, or occurrences, within the coverage of the policies.

B.

"Damages"

Defendants next contend that the restoration costs sought by the government in the Counterclaim were not damages within the meaning of the subject policies because, at common law, an injunction is an equitable remedy, while "damages" in an insurance policy typically refers only to legal relief. The term "damages" is not defined in the policies. Under California law, at least some "costs incurred to comply with an injunction mandating [environmental] cleanup or to reimburse a government agency for cleanup expenses the agency has incurred are 'damages' within the meaning of the [standard CGL] insurance policy." *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1563 (9th Cir. 1991)

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insured tenders [his] claim for the defense." *Reese v. Travelers Ins. Co.*, 129 F.3d 1056, 1060 (9th Cir. 1997). Since the evidence adduced at trial does not establish that Tsakopoulos's violations of the CWA were intentional, Defendants' failure to adduce any other evidence of Tsakopoulos's knowledge or intent is dispositive.

(citing *AIU Ins. Co. v. Superior Court (FMC Corp.)*, 51 Cal. 3d 807 (1990) ("*AIU*")). Here, the Counterclaim sought, in pertinent part, an Order "requir[ing] Tsakopoulos to prepare and implement a plan for the removal of discharged pollutants and restoration of waters of the United States on the portions of Borden Ranch in San Joaquin County, and to mitigate for the damage caused to the effected areas by the unlawful discharges of dredged or fill material." Tsakopoulos seeks indemnification only for the cost of the restorative aspect of the injunction, which requires him to reimburse the expenses of an independent environmental consultant designated by the government. Defendants argue that *Intel Corp.* and *AIU* are distinguishable because these cases dealt with injunctions issued under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). As the California Supreme Court noted in *AIU*, CERCLA authorizes an enforcing agency to seek and recover either injunctive restorative relief requiring a liable person to cleanup pollution or "reimbursement" for cleanup costs incurred by the government. *See* 51 Cal. 3d at 828, 837-38. It was reasoned that, since awards of reimbursement were "damages" within the meaning of CGL insurance policies, "it would exalt form over substance to interpret CGL policies to cover one remedy over the other." *Id.* at 840. Defendants point out that, under the CWA, the government may seek only civil penalties or injunctive relief. They assert that civil penalties under the CWA, for which Tsakopoulos does not seek reimbursement, are not "damages," and thus there is no reason to deem the costs of complying with injunctive relief imposed under the CWA

to be "damages" under the CGL insurance policies.[10] This argument is unpersuasive. As the Ninth Circuit noted in *Intel Corp.*, the California Supreme Court "rejected the argument that the distinctions or definitions contained in CERCLA with regard to the types of available relief were relevant to its determination: at issue was the interpretation of the insurance policy under state law." 952 F.2d at 1563. The California Supreme Court's holding that injunctions requiring environmental cleanup are "damages" under state law turned on the "purposes addressed" through the imposition of the injunctive releif. *AIU*, 51 Cal. 3d at 838; *see also id.* at 841 ("Under CERCLA and similar statutes, injunctive relief and reimbursement of response costs serve substantially the same purpose."). Therefore, predicting California law, the phrase "damages" in the relevant policies emcompasses injunctive restorative relief imposed under the CWA.

There is an additional consideration which neither side addresses and which supports this conclusion. The portion of the "pollution exclusion" in each policy which specifically excludes any "loss, cost or expense arising out of any . . . order that any insured or others test for,

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[10] Although neither side notes this fact, *AIU* involved injunctive relief imposed not only under CERCLA, but also under the CWA and other environmental statutes. 51 Cal. 3d at 815, 816. Further, the California Supreme Court's holding therein was that "the costs of injunctive relief under *the statutes in question here* are 'damages' for CGL purposes." *Id.* at 841-42 (emphasis added). It is unclear whether this language refers in part to the CWA. In any event, given the reasoning employed by the California Supreme Court, the injunctive remedy imposed upon Tsakopoulos constituted "damages" within the meaning of the relevant CGL insurance policies under California law.

monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants" would be rendered largely superfluous if such "loss[es], cost[s], or expense[s]" were not "damages" otherwise covered under the policy. An insurance policy provision should not be construed so that another policy provision is rendered mere surplusage. CAL. CIV. CODE § 1641; *Berg v. MTC Elec. Tech. Co.*, 61 Cal. App. 4th 349, 361-62 (1998); *Farmers Ins. Exchange v. Knopp*, 50 Cal. App. 4th 1415, 1421 (1996).

C.

Pollution Exclusions

Defendants next argue that liability for the damages Tsakopoulos caused to waters of the United States is excluded from coverage under the "total pollution exclusion" in each policy. However, this exclusion applies only to damages caused by "pollutants," a term which is defined in each policy as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Defendants argue that the term "pollutants" unambiguously includes soil displaced by Tsakopoulos's plowing operations. Tsakopoulos counters that, in this context, the term pollutants is at least ambiguous and, therefore, should be construed against Defendants.[11]

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[11] Because the definition of "pollutants" is ambiguous in this context, Tsakopoulos's alternative contention that the pollution exclusion should be construed as applying only to "man-made" materials is not reached.

Under California law, "[a]n insurer may select the risks it will insure and those it will not, and a clear exclusion will be respected. . . . Where the exclusion is clear, [the court] will not rewrite the insurance contract to impose coverage where none was contemplated. . . . However, an exclusion or limitation on coverage must be clearly stated and will be strictly construed against the insurer." *Smith Kandal Real Estate v. Continental Cas. Co.*, 67 Cal. App. 4th 406, 414 (1998) (citations omitted); *see also Manneck v. Lawyers Title Ins. Corp.*, 28 Cal. App. 4th 1294, 1302 (1994) ("[I]nsurance contract provisions relating to exclusions or exceptions from the performance of the basic, underlying obligations are construed strictly against the insurer and liberally in favor of the insured. . . . "). A term in an insurance policy is deemed ambiguous if "it is capable of two or more constructions, both of which are reasonable." *Fireman's Fund Ins. Co. v. Superior Court (Vickers Inc.)*, 65 Cal. App. 4th 1205, 1212 (1997), *review dismissed* 79 Cal. Rptr. 2d 72 (1998) ("*Fireman's Fund*"). "Of course, as is true of any contract, [the court] must interpret the policy as a whole, not in the abstract, and [the court] will not strain to create an ambiguity where none exists or indulge in tortured constructions to divine some theoretical ambiguity in order to find coverage where none was contemplated." *Id.* at 1212-13 (citations omitted); *see also Manneck*, 28 Cal. App. 4th at 1302.

As noted, a substance must be a "contaminant" or an "irritant" to be a "pollutant" within the meaning of the policies. Webster's Third New International Dictionary (1986) ("Webster's") defines a contaminant as "something that contaminates"; to "contaminate" means "to soil,

stain, corrupt, or infect by contact or association" or "make inferior or impure by mixture," or "to render unfit for use by introduction of unwholesome or undesirable elements." Webster's at 491.[12] An "irritant" is "something that irritates or excites," and to "irritate" means "to increase the action of" or "heighten excitement in" something. *Id.* at 1197. Soil discharged into previously-unspoiled waters of the United States might constitute a "contaminant" or an "irritant" if those terms were to be construed liberally. However, the definition of "pollutants" in each policy sets forth specific examples of contaminants and/or irritants: "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." According to the principle of *ejusdem generis*, the proper construction of the term "pollutant" is therefore "restricted" to contaminants and irritants which are "of the same kind, class, or nature" as the specific examples listed. *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1159 (1991); *see also Mez Indus., Inc. v. Pacific Nat'l Ins. Co.*, 76 Cal. App. 4th 856, 873 (1999) ("Our construction of [a phrase in an insurance policy] is informed by the doctrine of *ejusdem generis* under which a term is interpreted by reference to the surrounding language.").[13] Defendants argue that the

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[12] "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning." CAL. CIV. CODE § 1644; *see also Stanford Ranch, Inc. v. Maryland Cas. Co.*, 89 F.3d 618, 626 (9th Cir. 1996). Resort to a dictionary is often appropriate to find a word's ordinary and popular meaning. *See Scott v. Continental Ins. Co.*, 44 Cal. App. 4th 24, 29-32 (1999) (citing, among other sources, Webster's).

[13] Although *Harris* involved the construction of a general term which followed a list of specific terms, *"[e]jusdem generis*

use of the word "including" before the specific examples means that the definition of "pollutants" should not be limited to substances which are similar to specified examples. However, the use of the word "including" does not affect the application of the *ejusdem generis* doctrine. *County of Yolo v. Los Rios Community College Dist.*, 5 Cl. App. 4th 1242, 1254 (1992) (holding that the term "include, but need does not be limited to" does not preclude the application of the *ejusdem generis* principle).

Defendants next contend that certain California courts have held that the absolute pollution exclusion is unambiguous. *See, e.g., Titan Corp. v. Aetna Cas. & Surety Co.*, 22 Cal. App. 4th 457, 469-70 (1994) ("We are unaware of any California cases holding that a similarly worded exclusion was ambiguous as to its coverage.") (finding that trichloroethylene (TCE) is a "pollutant").[14] But insurance policy provisions "can, of course, be ambiguous in one context and not another." *Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 652 (1993) (noting that the pollution exclusion has been held to be unambiguous in covering discharges of "acids, alkalis and toxic chemicals," but ambiguous as to discharges of "natural

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applies whether specific words follow general words . . . or vice versa. In either event, the general term or category is 'restricted to those things which are enumerated specifically.' " *Harris*, 52 Cal. 3d at 1160 n.7 (quoting *Martin v. Holiday Inns, Inc.*, 199 Cal. App. 3d 1434, 1437 (1988)).

[14] Notably, however, *Titan Corp.* found that "[t]he relevant policy language [comprising the pollution exclusion] *may be ambiguous* on whether [discarded] scrap ferrite, brick, rubble, [or] wood debris [would] fall within the exclusionary language." 22 Cal. App. 4th at 470 (emphasis added).

materials") (citing *Hicks v. American Resources Ins. Co.*, 544 So. 2d 952, 953 (Ala. 1989), and *Molton, Allen & Williams v. St. Paul Fire & Marine Ins. Co.*, 347 So. 2d 95, 99 (Ala. 1977) ("*Molton*")); *accord Sterling Builders, Inc. v. United Nat'l Ins. Co.*, 79. Cal. App. 4th 105, 112 (2000) ("Contract terms are not ambiguous in a vacuum; they must be examined in context."); *see also Titan Corp.*, 22 Cal. App. 4th at 470. *Molton* is persuasive that the pollution exclusions at issue are ambiguous in this context.[15] In *Molton*, the insured was a developer who was constructing roads in a new development situated uphill from neighboring parcels. 347 So. 2d at 96. After the roadways were cleared and cut, but before they were paved, rainfall washed over the roadways and carried "sandstone and sandstone-type materials found naturally in the earth," which the rainwater had broken down into sand, onto the neighboring parcels, damaging them. *Id.* at 96-97. The Court rejected the insurer's argument that a pollution exclusion substantially similar to the ones in this case eliminated coverage for the damage to the neighboring parcels, stating:

> [W]hile a liberal construction of the 'pollution exclusion' would include the damage allegedly

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[15] Defendants AMMIC and LMCC contend that *Molton* is inapposite because that case "involved a pollution exclusion which, unlike the AMMIC policy, failed to define 'pollutants' at all." AMMIC's & LMCC's Memorandum of Points and Authorities filed June 15, 2000, at 14 n.3. This argument is misleading since the pollution exclusion in *Molton* was nearly identical to the exclusions in this case: it excluded coverage for "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials, or other irritants, contaminants or pollutants. . . . " 347 So. 2d at 97.

> caused by [the insured], the clause is not free from ambiguity. It is believed that the intent of the 'pollution exclusion' clause was to eliminate coverage for damages arising out of pollution or contamination by industry-related activities. *The use of specific industry-related irritants, contaminants and pollutants seem to indicate this was the reason for the exclusion. . . . [T]he clause here is ambiguous.*

Id. at 99 (emphasis added).

Defendants argue that California courts have rejected the notion that the pollution exclusion is limited to hazardous or toxic materials and suggest that *Molton* found an ambiguity based upon a finding that the sand in that case was not hazardous. However, this misreads the holding of *Molton*, which found that pollution exclusion was ambiguous in the context of sand, given the specific examples of "irritants, contaminants or pollutants" listed in the policy. 347 So. 2d at 97.

In contrast to *Molton*, Defendants cite *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Triangle Paving, Inc.*, 973 F. Supp. 560 (E.D.N.C. 1996), *aff'd*, 121 F.3d 699 (4th Cir. 1997) (Table) (*"Triangle Paving"*), which held that "sediment dislodged by the [insured's] construction activity [which] escaped the construction site and contaminated downstream water located on private property" constituted a "pollutant" within the meaning of a substantially similar pollution exclusion in a CGL insurance policy. 973 F. Supp. at 562. However, Defendants have not shown that *Triangle Paving* is persuasive guidance for interpreting the exclusion clauses in this case. First, the district

court in that case rejected the argument that "the enumerated list in the definition serves to limit pollutants to the specified examples," and held that, "[i]n context, the term 'including' clearly signifies that the ensuing list [of specified pollutants] is not one of limitation." *Id.* at 563. But under California law, the doctrine of *ejusdem generis* calls for a contrary analysis of the policies in this case. *Harris*, 52 Cal. 3d at 1159-60; *Los Rios Community College Dist.*, 5 Cal. App. 4th at 1254. The district court in *Triangle Paving* also noted that North Carolina's Sedimentation Pollution Control Act expressed the State legislature's finding that "[t]he sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem." 973 F. Supp. at 564 (quoting N.C. GEN. STAT. § 113A-51). Accordingly, the district court concluded that "the statutory scheme offers uncontroverted evidence of how sedimentation is perceived and treated in the very profession in which defendant is engaged." *Id.* at 565. Defendants point out that, similarly, the definition of "pollutants" under the CWA includes soil discharged during plowing. However, under California law, the determination whether a clause is ambiguous depends upon whether a clause is subject to two or more reasonable interpretations; a court must look to the provision's "plain meaning or the meaning a layperson would ordinarily attach to it." *Fireman's Fund*, 65 Cal. App. 4th at 1212-13; *see also Culligan v. State Compensation Ins. Fund*, 81 Cal. App. 4th 429, 434 (1999).

Since the definition of "pollutants" contained in each of the relevant policies is reasonably construed either to include soil discharged into waters of the United States or

to exclude such material, that term is ambiguous under the circumstances of this case. Neither construction would be "tortuous," *Fireman's Fund*, 65 Cal. App. 4th at 1212; "strange," *Culligan*, 81 Cal. App. 4th at 435; or "absurd," *id.*; each would be reasonable. While soil could arguably be an "irritant" or a "contaminant" when discharged into previously-unspoiled waters, the list of specified examples of pollutants which follows these terms restricts their construction. Since soil is not apparently of "the same kind, class, or nature," *Harris*, 52 Cal. 3d at 1159, as "smoke, vapor, soot, fumes, acids, alkalis, chemicals [or] waste," the definition of pollutant does not unambiguously cover soil.

Under California law, an ambiguity in an insurance policy "is resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promisee understood them at the time of formation." *Montrose Chem. Corp. of California v. Admiral Ins. Co.*, 10 Cal. 4th 645, 667 (1995) (quoting *AIU*, 51 Cal. 3d at 822); *see also* CAL. CIV. CODE § 1649. "This rule, as applied to a promise of coverage in an insurance policy protects not the subjective beliefs of the insurer but, rather, the objectively reasonable beliefs of the insured." *Id.* (quoting *Bank of the West v. Superior Court (Indus. Indem. Co.)*, 2 Cal. 4th 1254, 1265 (1992)) (internal quotation marks and citation omitted) "Only if this rule does not resolve the ambiguity [does the court] then resolve it against the insurer." *Id.* (quoting *Bank of the West*, 2 Cal. 4th at 1265); *see also AIU*, 51 Cal. 3d at 822; CAL. CIV. CODE § 1654.

Defendants contend that Tsakopoulos could not reasonably have expected the relevant policies to cover soil

discharged into waters of the United States because of his familiarity with the CWA and his repeated interactions with government agencies which enforce the CWA and which consistently had asserted that the CWA required that Tsakopoulos obtain a permit for soil discharges which might occur during his plowing activities. Tsakopoulos counters that the definition of "pollutant" set forth in the CWA should have no impact on the construction of the term "pollutant" contained in the relevant CGL insurance policies, citing *Legarra v. Federated Mut. Ins. Co.*, 35 Cal. App. 4th 1472 (1995). In *Legarra*, the insureds contended that petroleum was not a pollutant under their CGL insurance policy's pollution exclusion based upon a statutory exclusion for petroleum under a particular California hazardous-substances law. *Id.* at 1481. The court rejected this argument because the insurance policy defined the term "pollutant" differently than the cited statutes, and petroleum is widely held to be a "contaminant" or "irritant." *Id.* Similar reasoning applies here. Defendants have not shown how the CWA's definition of "pollutant" has any relevance to the reasonableness of Tsakopoulos's expectation of coverage under the policies. Although Defendants argue that Tsakopoulos's knowledge of the government's interpretation of the CWA is relevant to the objective reasonableness of his construction of the insurance policies, that argument fails to adequately consider how Tsakopoulos could have reasonably interpreted the disputed definition of, "pollutants" in this context, and the intended function of the pollution exclusion in the policies. Defendants have not shown that Tsakopoulos's expectation of coverage under the CGL insurance policies was objectively unreasonable.

Since coverage for the unpermitted discharges of soil "is consistent with the insured's objectively reasonable expectations" of coverage, the ambiguity of the definition of "pollutants" in this context must be resolved against Defendants. *Bank of the West*, 2 Cal. 4th at 1265; *see also* CAL. CIV. CODE § 1654.

D.

LMCC's Duty as Excess Insurance Provider

LMCC argues that, in any event, it owed no duty to defend Tsakopoulos on the Counterclaim until "the AMMIC policy and the Reliance policy issued to Tsakopoulos have been exhausted through judgments or settlements." AMMIC's & LMCC's Memorandum of Points and Authorities filed June 1, 2000, at 18. Tsakopoulos does not respond to this contention. "Unless the provisions of an excess policy provide otherwise, an excess insurer has no obligation to provide a defense to its insured before the primary coverage is exhausted." *Community Redevelopment Agency v. Aetna Cas. & Sur. Co.*, 50 Cal. App. 4th 329, 338 (1996) (citing *Hartford Accident & Indemnity Co. v. Superior Court (Syntex Corp.)*, 23 Cal. App. 4th 1774, 1779-80 (1994)). Since Tsakopoulos has not shown that his primary insurance coverage has been exhausted, LMCC does not owe a duty to defend the Counterclaim.

E.

Conclusion

Since Tsakopoulos has shown there existed "a potential for coverage" for "damages" sought by the Counterclaim, and Defendants AMMIC and Reliance have failed to demonstrate "the absence of any such potential," these Defendants owe Tsakopoulos a duty to defend him on the Counterclaim. *Standun*, 62 Cal. App. 4th at 888-89. Further, by failing to defend Tsakopoulos after he tendered the defense of the Counterclaim, AMMIC breached the insurance policy it issued to him. Tsakopoulos is entitled to a declaratory judgment that AMMIC and Reliance were obligated to defend him on the Counterclaim after the defense had been tendered to the respective insurer, and to summary adjudication of his breach-of-contract claim against AMMIC. Since Tsakopoulos has not shown that his primary insurance has been exhausted, LMCC is entitled to summary judgment on Tsakopoulps's duty-to-defend claims. Tsakopoulos has not shown that Reliance breached the duty to defend arising from its insurance policy, because it provided funding for the defense under a reservation of rights. Therefore, the aspect of Reliance's motion which seeks summary judgment on Tsakopoulos's breach-of-contract claim against it will be granted.[16]

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[16] In his papers, Tsakopoulos indicates that he would dismiss his claims for breach of contract and breach of the implied covenant of good faith and fair dealing against Reliance following resolution of these motions. Tsakopoulos's Memorandum of Points and Authorities filed May 31, 2000, at 6 n.1. Since Reliance seeks summary judgment on these claims in its motion, the claims are resolved herein.

III.

DUTY TO INDEMNIFY

Reliance agreed to indemnify Tsakopoulos for any damages he became legally obligated to pay arising out of covered occurrences through July 15, 1997. AMMIC agreed to indemnify him for occurrences on or after July 16, 1997. LMCC provides excess insurance coverage for occurrences on or after July 16, 1997. Tsakopoulos seeks a declaratory judgment that all Defendants are obligated to indemnify him for the restorative injunction aspect of the Judgment entered in *Borden Ranch*.

A.

AMMIC's Liability

"The general rule is long-settled in California that 'an insurer that wrongfully refuses to defend is liable on the judgment against the insured.' " *Pershing Park Villas Homeowners Assoc. v. United Pacific Ins. Co.*, ___ F.3d ___, 2000 WL 914153, at *5 (9th Cir. July 10, 2000) (quoting *Gray*, 65 Cal. 2d at 279). Since AMMIC breached its duty to defend Tsakopoulos on the Counterclaim, Tsakopoulos contends AMMIC is automatically obligated to indemnify him for the costs of the restorative injunction. AMMIC does not respond to this contention. However, it argues in a footnote that "Tsakopoulos acknowledges that the [Findings and Conclusions] 'ultimately found no violations by TSAKOPOULOS occurred after January, 1997.' While this may not impact AMMIC's duty to defend, it certainly impacts its duty to indemnify since [its] policy did not become effective until approximately seven (7) months *after* the last violation of the Clean Water Act.

Even if the Court determiens that coverage exists for violations of the Clean Water Act, AMMIC cannot have any indemnity obligations for violations of the Clean Water Act, none of which take place during its policy period." AMMIC's & LMCC's Memorandum of Points and Authorities filed June 15, 2000, at 22-23 n.5 (emphasis in original). Tsakopoulos does not dispute that no CWA violations after January of 1997 are at issue. Tsakopoulos's Memorandum of Points and Authorities filed May 31, 2000, at 18 n.3; Tsakopoulos's Memorandum of Points and Authorities filed June 14, 2000, at 28; Tsakopoulos's Reply Memorandum filed June 23, 2000, at 10.[17]

Since AMMIC wrongfully refused to defend Tsakopoulos on the Counterclaim, it is liable for "the amount which will compensate [Tsakopoulos] for all the detriment proximately caused [by its breach], or which, in the ordinary course of things, would be likely to result therefrom." *Amato v. Mercury Cas. Co.*, 53 Cal. App. 4th 825, 831 (1997) (quoting CAL. CIV. CODE § 3300). Where, as here, an insured is able to mount a defense notwithstanding "the insurer's refusal to defend, the usual contract damages are the cost of the defense." *Id.* However, where the insurer tortiously refuses to defend – i.e., breaches the

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[17] In the Findings and Conclusions, the undersigned district judge found that the EPA had not sustained the burden of demonstrating that any of the CWA violations occurred subsequent to January 30, 1997, the date after which the civil penalty for violations of the CWA increased by ten percent. Findings and Conclusions at 34. However, it was noted that there was evidence which suggested there might have been CWA violations as late as April of 1997. *Id.*

implied covenant of good faith and fair dealing – it is generally obligated to indemnify the insured for the subsequent judgment "and cannot rely on hindsight that a subsequent lawsuit establishes noncoverage." *Id.* at 833; *see also Pershing Park Villas Homeowners Assoc.*, 2000 WL 914153, at *5. Here, Tsakopoulos has not yet shown that AMMIC tortiously refused to provide for a defense on the counterclaim. Therefore, he is not entitled to a declaration that AMMIC is obligated to indemnify him for any part of the Judgment. However, AMMIC is not entitled to summary adjudication on this issue either because, as discussed *infra*, it has failed to demonstrate that it did not act in bad faith in refusing Tsakopoulos's tender of the defense.

B.

LMCC's Liability

Since Tsakopoulos does not dispute that there were no CWA violations found after January of 1997, and LMCC did not breach any duty to defend him on the Counterclaim, Tsakopoulos has not shown that LMCC is liable to indemnify him for any part of the Judgment.

C.

"Occurrence"

Defendants argue in opposition to Tsakopoulos's claims for indemnification that the Findings and Conclusions imposed liability for CWA violations which do not constitute an "occurrence" within the coverage of the policies. But as discussed supra, Defendants have not shown that the discharges of soil which led to

Tsakopoulos's liability under the CWA were expected or intended. Although the Findings and Conclusions evince that Tsakopoulos acted in gross dereliction of his duties under the CWA, Defendants point to no evidence that he acted with the requisite knowledge or intent such as would deprive him of coverage under the CGL insurance policies. The restorative injunction was not based upon any finding that Tsakopoulos acted intentionally or knowingly in discharging soil into jurisdictional waters. Therefore, Tsakopoulos has shown that the discharges constituted an occurrence or occurrences within the coverage of the policies.

D.

"Damages"

Defendants contend that the restorative injunction entered in *Borden Ranch* was imposed in lieu of $1 million in civil penalties and thus the injunction should be deemed punitive in nature, and not "damages" within the coverage of the policies. However, Tsakopoulos's consent to entry of the restorative injunction reflects his agreement to restore damaged wetlands, or replace any which cannot be restored. "In both instances, the amount 'restored' relates to actual harm caused by [Tsakopoulos's] prior actions." *United States v. Telluride Co.*, 146 F.3d 1241, 1248 (10th Cir. 1998).[18] Tsakopoulos's

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[18] Although Defendants did not argue that the injunction is punitive because the acreage involved in the restoration exceeds the actual amount found damaged in *Borden Ranch*, this argument would have been unavailing. The excess acreage resulted from the government's position that, because

decision to opt for a restorative injunction in lieu of a monetary civil penalty does not change the remedial nature of the restorative injunction. A consensual restorative injunction may constitute "damages" within the meaning of the CGL insurance policies. *Intel Corp.*, 952 F.2d at 1563-64 (concluding that "the California Supreme Court would extend [the holding in *AIU*] and find that costs incurred to comply with a consent decree are 'damages' "). Thus Defendants have not shown that the restorative injunction imposed did not constitute damages which Tsakopoulos was obligated to pay and for which he is be [sic] entitled to indemnification under the relevant policies.

E.

Conclusion

Since Tsakopoulos has shown that the cost of the restorative injunction imposed as part of the Judgment constitutes damages which he is legally obligated to pay within the meaning of the subject policies, Defendant Reliance is obligated to indemnify him for such costs. Since he has not yet shown that AMMIC acted in bad faith in denying his tender of the defense of the Counterclaim, he is not entitled to a declaration that AMMIC is

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Tsakopoulos's plowing activities caused indirect harm to "areas of Goose Creek and other waters on the San Joaquin [County] side of Borden Ranch [not directly impacted by the plowing activities], e.g., through sedimentation and increased water flow[,] compensatory restoration should be at a 2-to-1 ratio." *Borden Ranch*, Trial Brief of the United States filed August 10, 1999, at 39.

liable for indemnification of such costs. LMCC is entitled to summary judgment on Tsakopoulos's indemnification claims.

IV.

TSAKOPOULOS'S BAD-FAITH CLAIMS

Defendants seek summary judgment on Tsakopoulos's claims for breach of the implied covenant of good faith and fair dealing, arguing solely that they may not be held liable for breaching the covenant because they did not breach any contractual duty to Tsakopoulos. "[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable." *Love v. Fire Ins. Exchange*, 221 Cal. App. 3d 1136, 1151 (1990). Since AMMIC *did* breach its duty to defend Tsakopoulos on the Counterclaim, the aspect of its motion which seeks summary judgment on Tsakopoulos's bad-faith claim fails. However, Tsakopoulos has not shown that either Reliance[19] or LMCC have breached any contractual duty under their policies. Therefore, these Defendants are entitled to summary judgment on Tsakopoulos's bad-faith claims.

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[19] Tsakopoulos apparently acquiesces in this aspect of Defendant Reliance's motion. *See* note 16, *supra*.

V.

CONCLUSION

For the reasons stated, Tsakopoulos's motions are granted in part and denied in part, AMMIC's and LMCC's motion is granted in part and denied in part, and Reliance's motion is granted in part and denied in part. Tsakopoulos's claim for breach of contract against AMMIC is SUMMARILY ADJUDICATED in Tsakopoulos's favor. Tsakopoulos's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief against LMCC are SUMMARILY ADJUDICATED in LMCC's favor. Tsakopoulos's claims for breach of contract and breach of the implied covenant of good faith and fair dealing against Reliance are SUMMARILY ADJUDICATED in Reliance's favor. It is ADJUDGED AND DECLARED that AMMIC and Reliance owe Tsakopoulos a duty to defend him on the Counterclaim and that Reliance owes Tsakopoulos a duty to indemnify him for his costs in complying with the restorative injunction issued in *Borden Ranch*. The issues of damages on Tsakopoulos's breach of contract claim against AMMIC and of liability and damages on Tsakopoulos's bad-faith claims against AMMIC remain for trial.

IT IS SO ORDERED.

DATED: August 8, 2000

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES
DISTRICT JUDGE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In the matter of:	)	
	)	
Angelo K. Tsakopolous,	)	EPA Docket No.
Respondent.	)	CWA404-09a-96-004
	)	

Proceeding Under Section 309(a) of the Federal Clean Water Act, 33 U.S.C. § 1319(a), As Amended

ADMINISTRATIVE ORDER ON CONSENT

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I. INTRODUCTION

1. This Administrative order on Consent ("Consent Order" or "Order") is entered into voluntarily by the United States Environmental Protection Agency, Region 9 ("EPA"), the United States Army Corps of Engineers ("USAGE") and Angelo K. Tsakopoulos (hereinafter "Respondent"). Respondent is the owner of real property located at an agricultural site known as Borden Ranch in Sacramento and San Joaquin Counties, California. EPA alleges and Respondent denies that Respondent has discharged dredged and/or fill material at the Borden Ranch Site ("Site") in violation of Section 301(a) of the Clean Water Act (the "Act" or "CWA"), 33 U.S.C. § 1311(a), in that these activities were discharges of dredged or fill material into waters of the United States without authorization under Section 404 of the Act. 33 U.S.C. § 1344, and/or in violation of a permit issued pursuant to Section

404 of the Act. This Consent Order directs the Respondent to undertake specified measures to offset the adverse environmental impacts and habitat losses occurring in waters of the United States resulting from the alleged unauthorized activities.

II. JURISDICTION

1. EPA issues this Consent Order under the authority vested in its Administrator by Section 309(a) of the CWA, 33 U.S.C. § 1319(a). This authority has been delegated to the EPA Region 9 Administrator and re-delegated to the Director of Water Management Division. USACE is a party to this Consent Order because of its authority to issue orders requiring compliance with permit conditions pursuant to section 404(s) of the Clean Water Act, 33 U.S.C. § 1344(s).

2. Respondent agrees not to contest EPA's and USACE's jurisdiction or authority to enter into or enforce this Consent Order. Respondent also agrees not to contest the validity of any terms and conditions of this Consent order in any action to enforce, or in any action arising from, the Order. Specifically, Respondent agrees not to contest a determination by the Regional Administrator, EPA Region IX and the District Engineer, USACE Sacramento District, pursuant to Paragraph IX.5., as to the final preservation and/or mitigation requirements with which Respondent must comply.

3. EPA's and USACE's decisions or actions in entering into and pursuant to this Consent Order are not subject to judicial review prior to the United States' initiation of

judicial action to compel Respondent's compliance with this Consent Order.

III. DEFINITIONS

Unless defined herein, terms used in this Consent Order shall have the meaning as assigned in the CWA or in regulations promulgated by EPA or the USACE under the CWA. The following definitions shall apply to this Order:

1. "Consent Order" or "Order" shall mean this document, all attachments hereto, all its subsequent mutually agreed to modifications, and all submissions, including, but not limited to, deliverables, plans, schedules, reports (other than progress reports), maps, technical memoranda and specifications, which are required by this Order and approved by EPA. Upon EPA approval, Respondent's submissions are incorporated and enforceable as part of this Order. In case of inconsistency, this document and its subsequent modifications shall control.

2. "USACE" shall mean the U.S. Army Corps of Engineers.

3. "EPA" shall mean the U.S. Environmental Protection Agency.

4. "USFWS" shall mean the U.S. Fish and Wildlife Service.

5. "Respondent" shall mean Angelo K. Tsakopoulos.

6. "Parties" shall mean the EPA, USACE and Respondent.

7. "Day" shall mean a calendar day unless otherwise specified to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or federal legal holiday. In computing a prescribed period of time, the day of the event shall not be included. If a stated time period expires on a Saturday, Sunday or federal legal holiday, it shall be extended to include the next working day.

8. "Disturbed Site" shall mean the approximately 2100 acres at Borden Ranch depicted on the attached photographic map and jurisdictional delineation, (Attachment 1). Within this 2100 acres are certain areas which allegedly are regulated as waters of the United States under the CWA and which allegedly have been disturbed by Respondent's discharges. The Disturbed Site is depicted in Attachment 1 and consists of Parcel 2, Parcel 4, Parcel 5 and Prudential (all outlined in orange); Parcel 13, Parcel 15, Parcel 21, and Parcel 22 (all outlined in green) and Parcel 1 of Borden Ranch.

9. "404 Preservation Site" shall mean all portions of the area or areas selected and agreed to by Respondent, USACE (in consultation with USFWS) and EPA as suitable for use to offset the habitat losses of waters of the United States resulting from Respondent's alleged unauthorized activities through preservation of existing environmental values, and which are to be dedicated in a conservation easement, as required in Paragraph IX below. The 404 Preservation Site is depicted in Attachment 1 and consists of Parcel 3 and Parcel 26 (outlined in yellow) of Borden Ranch. The 404 Preservation Site is subject to a thirty (30) foot access easement for ingress

and egress acress [sic] the northern portion of Parcel 26 more particularly described as follows:

> The south thirty (30) feet of the East one-half of the Southwest one-quarter and the West one-half of the Southeast one-quarter of Section 32, in Township 6 North, Range 8 East, M.D.B. & M., according to the official Plat thereof.
>
> This easement provides access to Garry J. Odbert, the owner of the adjacent land which is the East one-half of the Southeast one-quarter of Section 32 in Township 6 North, Range 8 East, M.D.B. & M., according to the official Plat thereof.

A map setting forth the approximate location of this access easement is depicted in Attachment 2.

10. "Additional Preservation Site" shall mean that portion of Borden Ranch that Respondent intends to include within the conservation easement provided for in Paragraph IX in addition to the 404 Preservation Site. The parties agree that the natural values on these parcels will not be included in any determination pursuant to Paragraph IX.5. as to whether Respondent has provided excess mitigation. The Additional Preservation Site is depicted in Attachment 1 and consists of that portion of Parcel 27 of Borden Ranch (excluding the Home Site) that is outlined in blue.

11. "Mitigation Site" shall mean all portions of the area or areas selected and agreed to by Respondent, USACE and EPA suitable for use to offset the habitat losses of waters of the United States resulting from Respondent's alleged unauthorized activities through creation, restoration and/or enhancement of existing environmental

values, and which are to be dedicated in a conservation easement, as required in Section IX below.

12. "Preservation/Mitigation Program" shall mean those deliverables and activities to be produced and/or undertaken by Respondent for purposes of off-setting the temporal and permanent habitat losses resulting from the alleged unauthorized activities. It includes the Preservation Program provided for in Paragraph IX.6. and, if subsequently agreed to by the parties, the Mitigation Program Provided for in Paragraph IX.7.

13. "Work" shall mean all activities Respondent is required to undertake and accomplish under this Consent Order.

IV. PARTIES BOUND

1. This Consent Order shall be binding on Respondent and its officers, directors, partners, agents, employees, attorneys, successors and assigns, and on all persons, independent contractors, contractors, and consultants acting in concert with Respondent.

2. Respondent shall provide a copy of this Consent Order to any successor in interest to its control, operation, or any other interest in all or any portion of the 404 Preservation Site, the Additional Preservation Site, or the Mitigation Site at least thirty (30) days prior to the transfer, and shall simultaneously notify EPA in writing that such notice has been given. Within fourteen (14) days after the effective date of this Consent Order or the date of contracting, whichever is later, Respondent shall provide a copy of this Consent Order to all contractors and/

or consultants they retain to perform any of the Work. Respondent shall condition the transfer of control, operation or any other interest in all or any portion of the 404 Preservation Site, the Additional Preservation Site or the Mitigation Site, and any contract related to the performance of the Work, upon the successful execution of this Consent Order. No transfer or contract shall in any way affect Respondent's obligation to comply fully with all the terms and conditions of this Consent order.

3. The undersigned signatories for Respondent certify that they are authorized to execute this Consent Order and legally bind Respondent.

V. STATEMENT OF PURPOSE

1. The parties enter into this Consent Order to compensate for the alleged environmental and habitat losses caused by the allegedly unauthorized discharges of dredged or fill material (including activities alleged to be not in compliance with Permit # 199300605 issued by USACE) to waters of the United States at Borden Ranch, Sacramento and San Joaquin Counties, California, by implementing a comprehensive program, set forth in Paragraph IX below, of restoration, creation, monitoring and preservation of aquatic resources.

VI. FINDINGS OF FACT

1. Respondent is now and, at all times mentioned herein, is a legal person.

2. Respondent owns real property in Sacramento and San Joaquin Counties as indicated on the attached map

(Attachment 1). This property consists of approximately 8,348 acres and is located in the Lodi-Woodbridge area ("the Site").

3. EPA asserts, and Respondent denies, that Respondent undertook activities that resulted in the discharge of dredged and/or fill material to waters of the United States on the Site.

4. EPA has estimated that the alleged activities resulted in adverse impacts to approximately 49.1 acres of waters of the United States at a 2100 acre portion of the Site (herein referred to as the Disturbed Site). While Respondent does not accept EPA's determination that its activities resulted in the discharge of dredged and/or fill material to waters of the United States on the Site, for purposes of this Consent Order and for determining the appropriate scope of the Preservation and Mitigation, Sites and Preservation/Mitigation Program, and only for that purpose, the parties agree to adopt the EPA estimate that the Respondent's activities resulted in the discharge of dredged and/or fill material in waters that adversely affected 49.1 acres of CWA-regulated waters of the United States at the Disturbed Site. As discussed below in Paragraph IX, Respondent reserves the right to contest the extent of the adverse affects [sic] to the 49.1 acres of CWA-regulated waters of the United States at the Disturbed Site.

5. The Respondent applied for, but did not receive, a permit under section 404 of the CWA to discharge dredged or fill material to some of the alleged CWA-regulated waters of the United States at the Site prior to conducting the activities alleged by EPA to constitute the

discharge of dredged and/or fill material to waters of the United States on the Site.

6. Respondent asserts that it received oral and written assurances from EPA and USACE that the activities alleged by EPA to constitute unauthorized discharges were in fact activities not regulated by the Clean Water Act, and that Respondent relied on such representations in good faith. Respondent asserts that plowing and other soil management activities that do not break up an underlying clay or hard pan are not regulated under the Clean Water Act. Respondent further contends that it did not deep rip any vernal pools in the Disturbed Area. Respondent asserts that since the activities it conducted were not regulated by the Clean Water Act, it was not necessary for Respondent to obtain a permit for said activities. Respondent makes these assertions to clarify Respondent's position for the record, not as a basis for challenging the jurisdictional foundation for this Consent Order. EPA and USACE deny each and every factual assertion in this paragraph.

VII. EPA'S CONCLUSIONS OF LAW AND DETERMINATIONS

1. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person into a "navigable water," or "water of the United States," except in compliance with, among other things, a permit issued under the CWA.

2. Respondent is a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

3. The Disturbed Site described in Section VI above includes "waters of the United States" under federal regulations implementing Section 502(7) of the CWA. 40 C.F.R. §§ 122.2 and 230.3; 33 C.F.R. § 328.3.

4. The dredged and fill materials described in Section VI above are "pollutants" under Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

5. Placing pollutants within the waters of the U.S. at the Borden Ranch Site is a "discharge of pollutants" under Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

6. By discharging pollutants into waters of the United States without a permit under the CWA, Respondent has violated Section 301(a) of the CWA, 33 U.S.C. § 1311.

7. Respondent denies each and every conclusion of law and determination set forth in paragraphs 1 through 6 above.

VIII. CESSATION OF UNAUTHORIZED DISCHARGES

1. Respondent shall not discharge pollutants into any waters of the United States except in compliance with an appropriate authorization under the CWA.

2. Prior to deep ripping in areas delineated as waters of the United States at Borden Ranch, Respondent shall notify USACE of the planned activity. If USACE determines that the proposed activity requires authorization under the CWA, Respondent shall obtain the required authorization prior to engaging in the activity. Nothing in this paragraph shall limit Respondent's rights to contest a determination by USACE that a particular activity requires authorization.

IX. WORK TO BE PERFORMED

1. Respondent shall take all necessary actions to complete the Work as set forth in the Preservation/Mitigation Program. The Preservation/Mitigation Program is enforceable under this Consent Order.

2. The purpose of the Preservation/Mitigation Program required under this Consent order is to preserve waters of the United States, including vernal pool and other wetland functions, typically associated with Sacramento County wetland habitats, as agreed upon by the parties as set forth in the Preservation/Mitigation Program. If agreed to by the parties, the Preservation/Mitigation Program may, in addition, include a component of creation, restoration and enhancement to aquatic functions.

3. Respondent shall take all necessary actions to complete the dedication of a conservation easement over the 404 Preservation Site and the Additional Preservation Site to a third party approved by USACE (in consultation with USFWS) and EPA protecting these sites in perpetuity, consistent with the provisions of paragraph IX.6. To the extent possible, EPA will assist the Respondent with developing and finalizing the conservation easement, which shall be dedicated no later than May 31, 1996, and prior to any additional activities being conducted in the disturbed areas.

4. The purpose of the 404 Preservation Site is to preserve and protect in perpetuity approximately 1368 acres of land. Conservation and protection of this area (including the waters of the United States included within) has been determined by EPA and USACE to be appropriate

and practicable mitigation for the temporal and permanent loss of the approximately 49.1 acres of waters of the United States at the Disturbed Site. The 404 Preservation Site has been agreed upon by the parties and is depicted in Attachment 1.

5. Respondent contends that the, 404 Preservation Site contains environmental and wildlife functions in excess of that which is needed to compensate for the alleged impacts to functions of waters of the United States resulting from Respondent's activities that are the subject of this Consent Order. Respondent contends that its activities have not adversely affected functions on waters of the United States on the Disturbed Site. EPA and USACE do not agree with Respondent's contention, but do agree to allow for reconsideration of some of the requirements of the Preservation Program as follows:

a. The conservation easement required in Paragraph IX.3. shall not be modified based on this reconsideration except as explicitly provided for in Paragraph IX.5.

b. The parties may conduct studies, to be concluded no later than August 31, 1997 to evaluate the impact to waters of the United States from Respondent's alleged activities. The parties will share data and draft technical reports resulting from their studies.

c. Following completion of the studies, the parties will meet and confer to attempt to resolve any remaining dispute as to the requirements of the Preservation/Mitigation Program, including, but not limited to, whether the Respondent's activities have had a negative or positive

impact on environmental functions on the Disturbed Site, whether the 404 Preservation Site has environmental functions in excess of those needed to compensate for the impacts of Respondent's alleged activities, and whether it is acceptable to include an additional Mitigation site in the Preservation/Mitigation Program where aquatic functions will be created, restored and/or enhanced,

d. If the parties are unable to resolve their dispute as to the requirements of the Preservation/Mitigation Program, any party may, in writing, submit the dispute to the Regional Administrator, EPA Region IX and the District Engineer, USACE Sacramento District for resolution. In deciding the final requirements of the Preservation/Mitigation Program, the Regional Administrator and the District Engineer will not increase the overall burden to Respondent beyond that of implementing the Preservation Program set forth IX.6. The issues which may be submitted for dispute resolution are:

1. To what extent have Respondent's activities caused or contributed to the destruction or degradation of waters of the United States as defined by 33 C.F.R. § 323.2(d)(4), (5), 33 C.F.R. § 328.3(a), and 40 C.F.R. § 230.3(s)?

2. What is the appropriate preservation ratio to apply to the impacts from Respondent's activities in determining how much of the 404 Preservation Site is to be set aside to compensate for Respondent's activities?

3. Is it appropriate to allow Respondent to include an additional Mitigation site in the Preservation/Mitigation Program?

4. Based on the final determination of the extent of the Preservation/Mitigation Program, what environmental functions exist at the 404 Preservation Site in excess of the functions needed to compensate for the impact of Respondent's activities which may be applied to offset impacts to waters of United States from other projects.

e. Attachment 3, incorporated herein by reference, sets forth procedures to be followed in the event any party formally submits the dispute as to the requirements of the Preservation/Mitigation Program to the Regional Administrator and the District Engineer for resolution.

5. The Preservation/Mitigation Program and the granting of the conservation easement for the 404 Preservation Site, the Additional Preservation Sites and the Mitigation Site shall be incorporated and enforceable as part of this Consent Order. Failure to comply fully with the Preservation/Mitigation Program, including any and all of its components, or with the granting of the conservation easement for the 404 Preservation Site, the Additional Preservation Sites and/or the Mitigation Site shall be deemed violations of this Consent Order.

6. The Preservation Program shall include the following elements:

a. Respondent shall grant a conservation easement for the 404 Preservation Site and the Additional Preservation site to an entity approved by

USACE (in consultation with USFWS) and EPA. The easement holder, and any subsequent transferee of the easement shall receive a copy of this Consent Order.

b. The terms of the conservation easement shall be approved by USACE (in consultation with USFWS) and EPA, and shall, at a minimum, provide that the 404 Preservation Site and the Additional Preservation Site are to be managed for the benefit of the sites' habitat functions and values, and in particular for the benefit of the vernal pool ecosystems at the sites. The easement holder will have the authority to restrict as necessary or prevent uses incompatible with these management goals. The easement will establish and adequately endow a program approved by USACE (in consultation with USFWS) and EPA to monitor all adverse direct and indirect efects [sic] on the preserve. This program is intended to monitor and manage such issues as litter and dumping, sediment control, fences and other management issues within the preserve (it is not intended to provide scientific monitoring of vernal pool crustaceans or plant communities). USACE and EPA shall be identified as intended third party beneficiaries of the grant of this conservation easement, and shall be provided notice of and the right to approve any transfer of the conservation easement.

c. Respondent shall implement controls on access to the 404 Preservation Site and the Additional Preservation Site sufficient to minimize disturbance to habitat functions. At a minimum, this shall include post and cable fencing or barbed wire fencing completely surrounding the

sites, with locked gates on any existing roads into the sites.

d. Respondent shall provide sufficient dedicated funding to the easement holder to ensure that the requirements of the Preservation Program are implemented in perpetuity.

e. Respondent shall submit a report for approval to USACE (in consultation with USFWS) and EPA certifying its compliance with the requirements of the Preservation Program.

7. A Mitigation Program shall be developed if Respondent, USACE and EPA agree to include a component of creation, restoration and enhancement to aquatic functions as part of Respondent's compliance obligations under this Consent Order. If a Mitigation Program is developed, it shall be adopted as a modification to this Consent Order, and shall be implemented consistent with the provisions of Paragraph X through XIII.

8. Respondent shall place, or cause to be placed straw wattles, hay bales or equivalent siltation control devices approved by USACE (in consultation with USFWS) along the boundaries of any portions of the Disturbed Site planted as a vineyard, wherever the vineyard boundary intersects the watershed of any vernal pool or other seasonal wetland within 250 feet of the vineyard.

9. Notwithstanding any review, suggestions, comments, or approval by EPA, USACE, or other governmental entities, Respondent shall remain solely responsible for the full and successful implementation of the Preservation/Mitigation Program and for achieving and maintaining full compliance with this Consent Order, the CWA, and any applicable laws, regulations and permits.

X. QUALIFICATIONS FOR MITIGATION PROGRAM WORK

1. All Mitigation Program Work shall be done by and under the supervision of persons with sufficient education, experience and expertise for the work.

2. Respondent shall, within twenty-one (21) days of selecting its general contractor for the Mitigation Program Work, provide EPA with a list identifying the contractor, the names, titles and qualifications of the contractor's designated project manager(s) used by Respondent or their contractor to perform Work related to the Mitigation Program. Respondent shall notify EPA in writing of any subsequent changes or additions to this list.

XI. MODIFICATION OF CONSENT ORDER

1. EPA may, after consultation with Respondent, make a preliminary determination that tasks in addition to those defined in the Mitigation Program, including any approved modifications, are necessary to accomplish the purposes of the Mitigation Program as set forth in Section IX above. EPA shall notify Respondent of its preliminary determination in writing and Respondent shall have thirty (30) days from receipt to submit a written response.

2. Modification of this Consent Order shall be in writing and shall take effect only when agreed to and signed by all the parties.

XII. PROGRESS MEETINGS AND REPORTS

1. Respondent shall meet or confer by phone with EPA at least every three weeks and as frequently as EPA requests, during the initiation, conduct, and completion of all of the Mitigation Program to discuss the technical aspects of the Mitigation Program, and any anticipated problems or new issues. Meetings or conference calls will be directed by EPA and scheduled at EPA's discretion. EPA and Respondent have the discretion to invite other federal, state and local government agencies and the public to participate in any of the meetings or conference calls.

XIII. ACCESS TO SITE AND DATA

1. At EPA's written request, Respondent shall submit requested results or data relative to the Mitigation Program within seven (7) days from receipt of the results or data by Respondent.

2. Respondent shall notify EPA in writing at least fifteen (15) days prior to conducting significant events (as defined in the Mitigation Program) in preparation for or in accordance with the Mitigation Program.

3. This Consent Order shall in no way affect EPA's authority to enter, inspect, sample or monitor compliance under any law, permit, court order or agreement and Respondent shall use their best efforts to arrange for access by EPA or its authorized representatives for determining compliance with this Consent Order until termination of this Consent Order. For purposes of this Consent Order, EPA's authorized representatives shall

include all EPA employees and contractors, all Corps employees and contractors, and such other person as EPA may designate. Such access shall exclude any attorney/client privileged information and/or documentation.

XIV. DESIGNATED PROJECT COORDINATORS

1. The parties have designated their respective Project Coordinators as follows:

A. For EPA:

Elizabeth White (W-3-3)
U.S. Environmental Protection Agency, Region 9
Wetlands and Sediment Management Section
75 Hawthorne Street
San Francisco, California 94105
(Tel) (415) 744-1988
(Fax) (415) 744-1078

B. For USACE

Tom Cavanaugh
U.S. Army Corps of Engineers, Sacramento District
Regulatory Branch
1325 J Street
Sacramento, CA 95814
(Tel) (916) 557-5261
(Fax) (916) 557-6877

C. For Respondent:

Angelo K. Tsakopoulos
AKT Development Corporation
7700 College Town Drive, Suite 101
Sacramento, CA 95826-2397
(Tel) (916) 383-2500
(Fax)

2. The Project Coordinators shall be responsible for overseeing the implementation of this Consent Order and receiving communications, which include, but are not limited to, all documents, reports, comments, approvals, and other correspondence submitted or exchanged under this Consent Order.

3. EPA, USACE and Respondent each may change their respective Project Coordinator by giving the other party ten (10)-day advance written notice.

4. Respondent's Project Coordinator may assign a representative, or alternate Project Coordinator, including a contractor, to serve as site representative for oversight of completion of the Preservation/Mitigation program.

5. EPA may arrange for a qualified person not on EPA staff to assist in its oversight and review of the implementation of the Preservation/Mitigation Program. The person may observe work and make inquiries but is not authorized to modify this Consent order, including the Preservation/Mitigation Program.

XV. SUBMISSIONS AND NOTIFICATIONS

1. All submissions required by this Consent Order shall be signed by Respondent's principal executive officer, or by that Person's duly authorized representative. The authorization must be in writing and specify either an individual or a position having responsibility for the overall operation of the activities being reported or for Respondent's environmental matters.

2. The person signing Respondent's submissions shall make the following certification:

I certify under penalty of law that the information submitted is true and correct to the best of my knowledge and belief. I am aware that there are significant penalties for submitting false information, including, but not limited to, the possibility of fines and imprisonment for knowing violations under § 309 of the Clean Water Act, 18 U.S.C. § 1001, and other relevant federal statutes.

3. Unless otherwise specified or requested by EPA, Respondent shall provide an original and one copy of each deliverable required under this Consent order by first-class mail to EPA's Project Coordinator.

4. Submissions by Respondent shall be deemed made on the date they are postmarked.

XVI. RECORD PRESERVATION

1. Respondent shall preserve and retain, and shall instruct their contractors, subcontractors and any other person acting on their behalf, to preserve and retain all records and documents that relate in any manner to the Disturbed Site and/or the Preservation or Mitigation Site for three (3) years after termination of this Consent Order. Upon termination of the three-year period, Respondent shall notify EPA at least ninety (90) days prior to the scheduled destruction of the documents. If EPA requests that the documents be saved, Respondent shall, at no cost to EPA, give EPA the documents or copies of the documents.

XVII. DELAY OF PERFORMANCE/FORCE MAJEURE

1. "Force Majeure," for purposes of this Consent Order, is any event entirely beyond the control of Respondent or any entity controlled by Respondent, including its contractors, consultants and subcontractors, that delays or prevents performance of any obligation under this Consent Order notwithstanding Respondent' best efforts to avoid the delay. The best efforts requirement includes using best efforts to anticipate any such event and minimize the delay caused by any such event to the greatest extent practicable. Examples of events that are not force majeure events include, but are not limited to, increased costs or expenses of any work to be performed under this Consent Order, financial or business difficulties of Respondent, and normal inclement weather.

2. If any event may occur or has occurred that may delay the performance of any obligation under this Consent Order, whether or not caused by a force majeure, Respondent shall notify by telephone the EPA Project Coordinator or, in his or her absence, the Chief of the Wetlands and Sediment Management Section (W-3-3), EPA Region 9, within two business days of when Respondent knew that the event might cause a delay. Within fifteen (15) days thereafter, Respondent shall provide in writing the reasons for the delay, the anticipated duration of the delay, the measures taken or to be taken to prevent or minimize the delay, a timetable by which those measures will be implemented, and whether, in Respondent's opinion, such event may cause or contribute to an endangerment to public health, welfare or the environment. Respondent shall exercise their best efforts to avoid or minimize any delay and any effects of a delay. Failure to

comply with the notice requirements of this paragraph shall preclude Respondent from asserting any claim of force majeure.

3. If EPA agrees that an actual or anticipated delay is attributable to force majeure, the time for performance of the obligation shall be extended by written agreement of the parties. An extension of the time for performing an obligation directly affected by the force majeure event shall not, of itself, extend the time for performing a subsequent obligation.

4. Respondent shall have the burden of demonstrating, by a preponderance of the evidence, that the actual or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay was or will be warranted under the circumstances, that Respondent did exercise or are using their best efforts to avoid and mitigate the effects of the delay, and that Respondent complied with the requirements of this section.

XVIII. FAILURE TO COMPLY WITH CONSENT ORDER

1. In the event of circumstances which EPA considers a potential violation of the provisions of this Consent Order on the part of Respondent, EPA shall use its best efforts to (i) provide Respondent with notice either orally or in writing of the facts or conduct which allegedly constitute violation, and (ii) inform Respondent of the appropriate remedial actions to cure the alleged violation.

2. EPA reserves all available legal and equitable remedies to enforce this Consent Order, and the right to seek recovery of any costs and attorney fees incurred by

EPA in any actions against Respondent for non-compliance with this Consent Order. Nothing in this Consent Order shall in any way limit Respondent's rights to recover attorney fees consistent with applicable law.

3. Failure to comply with this Consent order is a violation of the CWA. Such violation may subject Respondent to injunctive relief under Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and civil penalties not to exceed $25,000 per day for each violation under Section 309(d) of the CWA, 33 U.S.C. § 1319(d). In addition, a negligent violation is punishable by a fine of not less than $2,500 nor more than $25,000 per day of violation, or imprisonment for not more than one year, or by both, 33 U.S.C. § 1319(c)(1); a knowing violation is punishable by a fine of not less than $5,000 nor more than $50,000 per day of violation, or imprisonment for not more than three years, or by both. 33 U.S.C. § 1319(c)(2).

XIX. SCOPE OF CONSENT ORDER

1. This Consent Order is not and shall not be construed to be a permit under the CWA, nor shall it in any way relieve or affect Respondent's obligations under the CWA, or any other applicable federal, state or local laws, regulations and permits. Compliance with this Consent Order shall be no defense to any actions commenced pursuant to such applicable laws, regulations or permits. EPA and USACE find that Respondent's compliance with the provisions of this Consent Order will satisfy the objectives of the Clean Water Act and provide adequate and appropriate relief with respect to section 404 of the

Act as applicable to Respondent's activities at the Disturbed Site that are the subject of this Consent Order.

2. This Consent Order shall in no way affect the rights of EPA, USACE or the United States against any person not a party hereto.

XX. SEVERABILITY

The provisions of this Consent Order shall be severable. Should any provision be declared by a court of competent jurisdiction to be unenforceable, the remaining provisions shall remain in full force and effect.

XXI. TERMINATION AND SATISFACTION

This Consent Order shall terminate when EPA issues a written approval of Respondent's written certification that Respondent has fully completed all Work required under this Consent Order, including any additional tasks which EPA has determined to be necessary in accordance with Section XI above. Respondent's certification of completion shall comply with requirements set forth in Section XV above.

XXII. EFFECTIVE DATE

This Consent Order shall take effect upon signature by all parties.

IT IS SO AGREED AND ORDERED:

For UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY
REGION 9

Dated: 1 May 1996

/s/ Alexis Strauss
Alexis Strauss
Acting Director
Water Management Division

For UNITED STATES ARMY
CORPS OF ENGINEERS
SACRAMENTO DISTRICT

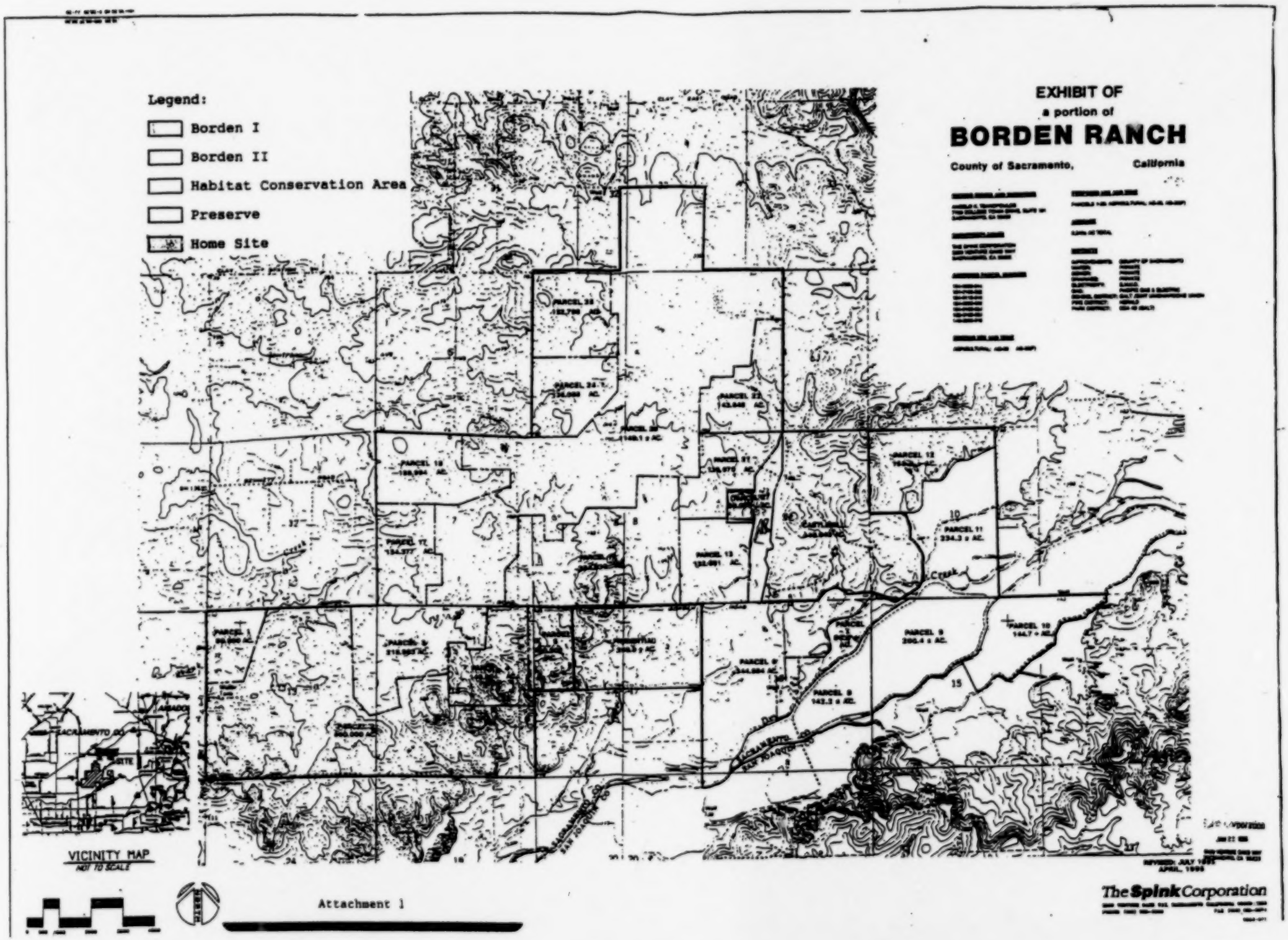
Dated: 3 May 1996

/s/ Colonel John N. Reese
Colonel John N. Reese
District Engineer

For RESPONDENT Angelo K.
Tsakopoulos

Dated: May 2 1996

/s/ Angelo K. Tsakopoulos
Angelo K. Tsakopoulos



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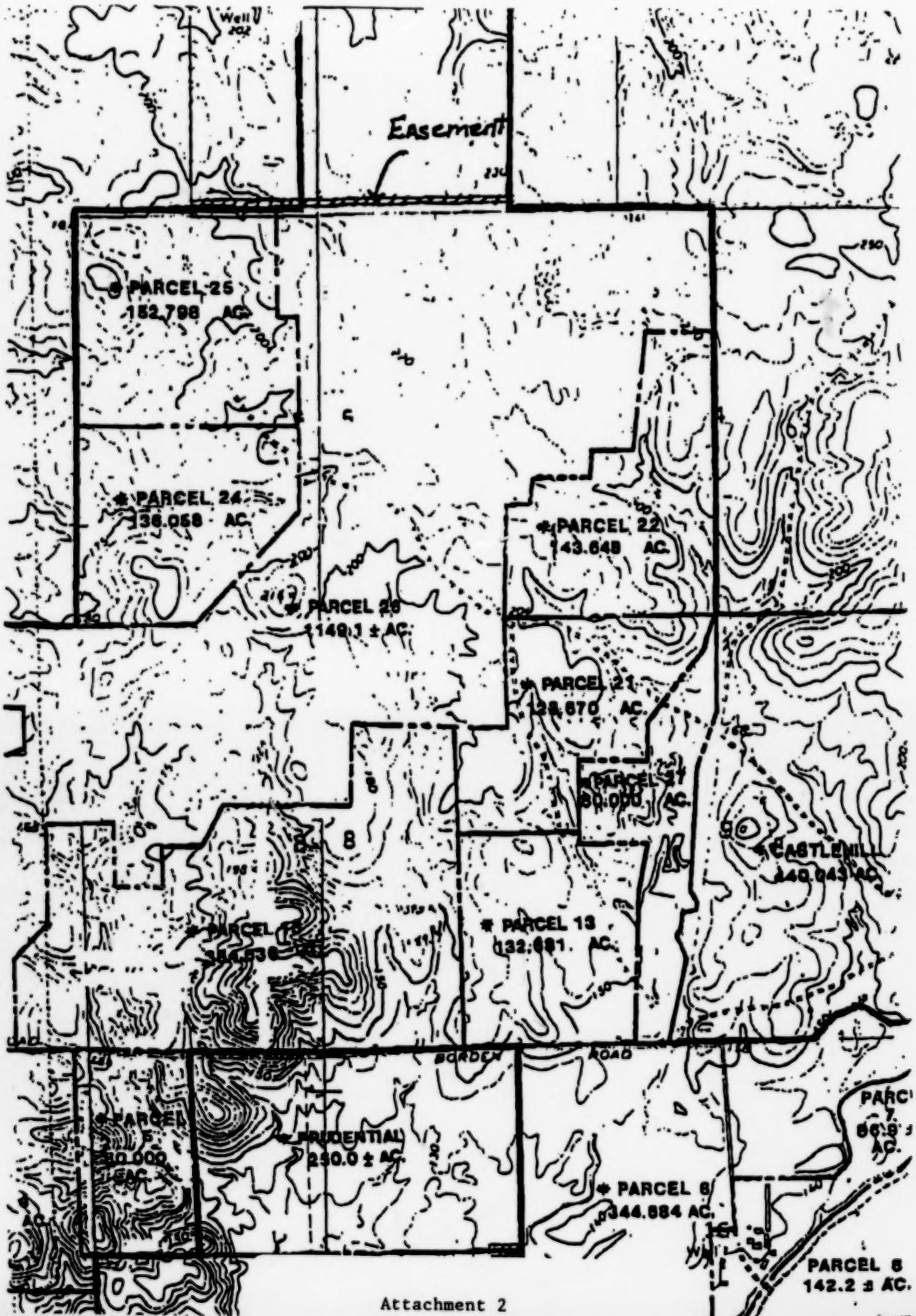

Attachment 2

Attachment 3

In the Matter of Angelo K. Tsakopoulos

EPA Docket No. CWA404-09a-96-004

Dispute Resolution Procedures

Purpose and Scope

These procedures shall apply if either party to the above-referenced order invokes the formal dispute resolution procedures authorized by paragraph IX.5.d. of the order. These procedures shall not apply to any other matter, including, but not limited. to, any other dispute over the terms and conditions of the order. For purposes of these procedures, EPA and USACE shall be treated as a single party.

Invocation of Dispute Resolution

The party seeking to invoke dispute resolution shall do so in writing. The document invoking dispute resolution shall identify the nature of the dispute, shall certify that good faith efforts have been undertaken to resolve the dispute, and shall describe specifically which of those issues identified in paragraphs IX.5.d.1. through IX.5.d.4. the party seeks to resolve through dispute resolution. The other party to the order may identify additional issues from those identified in paragraphs IX.5.d.1 through IX.5.d.4. for dispute resolution in writing within 15 days of service of the initial submittal invoking dispute resolution.

Document Submission

The parties shall submit their opening briefs in support of their proposed resolution to the dispute no later than 45 days after service of the initial submittal invoking dispute resolution. These briefs shall not exceed 25 pages in length. These briefs may be accompanied by final technical reports based on the studies provided for in paragraph IX.5.b. if the party submitting the report has complied with the requirements of paragraph IX.5.b. concerning the sharing of data and draft technical reports.

The parties may submit rebuttal briefs responding to opening briefs no later than 30 days after service of the opening briefs. These briefs shall not exceed 10 pages in length.

Ex Parte Contacts

The parties will comply with regulations governing ex parte contacts set forth at 40 CFR § 124.78. Consistent with these regulations, the Regional Administrator and the District Engineer may designate staff as members of the decisional body to assist in making their final determination. Such staff, if any, shall be designated in writing. The parties shall comply with the 40 CFR § 124.78 requirements with respect to such staff upon service of such designation. These limitations relating to ex parte contacts do not limit the parties' rights to contact other government officials except as specifically limited in 40 CFR § 124.78.

Decisionmaking Procedures

The Regional Administrator and the District Engineer shall make their decision within 90 days of the filing of the final brief authorized in this matter (unless this time is extended as authorized below). The Regional Administrator and the District Engineer will determine, in their discretion, whether to have any form of hearing on matters presented for their decision. They may also propose additional settlement discussions between the parties with or without their participation.

Extension of Time

The deadlines for submission of any documents required by these procedures may be extended by agreement of the parties. The parties may also jointly petition to stay the proceedings at any time prior to a final decision for purposes of negotiating a settlement.

Service

All documents other than briefs and technical reports will be served by fax and first class mail on the parties as designated below, except that service on the Regional Administrator and District Engineer shall be by first class mail only. Briefs and technical reports will be served by overnight mail. Each party shall notify the other in writing of any change to the parties to be served.

Service to EPA shall be as follows:

Felicia Marcus
Regional Administrator
U.S. EPA Region IX
75 Hawthorne Street
San Francisco, CA 94105

Hugh Barroll
Assistant Regional Counsel
U.S. EPA Region IX
75 Hawthorne Street
San Francisco, CA 94105
FAX: (415) 744-1321

Service to USACE shall be as follows

Colonel John N. Reese
District Engineer
U.S. Army Corps of Engineers
Sacramento District
1325 J Street
Sacramento, CA 95814

Lisa Clay
U.S. Army Corps of Engineers
Sacramento District
1325 J Street, Room 1340
Sacramento, CA 95814
FAX: (916) 557-5118

Service to Angelo K. Tsakopoulos shall be as follows:

Angelo K. Tsakopoulos
AKT Development Corporation
7700 College Town Drive, Suite 101
Sacramento, CA 95826-2397
FAX: (916) 383-0552

Computation of Time

For purposes of these procedures, day shall mean calendar day, provided, however, that if the deadline for any action falls on a Saturday, Sunday or Federal holiday, that deadline shall be extended to the next working day.

[SEAL] **Department of the Army** [LOGO]
U.S. Army Corps of Engineers

United States Environmental Protection Agency

12 DEC 1996

MEMORANDUM TO THE FIELD

SUBJECT: Applicability of Exemptions under Section 404(f) to "Deep-Ripping" Activities in Wetlands

PURPOSE: The purpose of this memorandum is to clarify the applicability of exemptions provided under Section 404(f) of the Clean Water Act (CWA) to discharges associated with "deep-ripping" and related activities in wetlands.[1]

BACKGROUND:

1. Section 404(f)(1) of the CWA exempts from the permit requirement certain discharges associated with normal farming, forestry, and ranching practices in waters of the United States, including wetlands. Discharges into waters subject to the Act associated with farming, forestry, and ranching practices identified under Section 404(f)(1) do not require a permit except as provided under Section 404(f)(2).

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[1] As this guidance addresses primarily agricultural-related activities, characterizations of such practices have been developed in consultation with experts at the U.S. Department of Agriculture (USDA), Natural Resources Conservation Service.

2. Section 404(f)(1) does not provide a total, automatic exemption for all activities related to agricultural, silvicultural, or ranching practices. Rather, Section 404(f)(1) exempts only those activities specifically identified in paragraphs (A) through (F), and "other activities of essentially the same character as named" [44 FR 34264]. For example, Section 404(f)(1)(A) lists discharges of dredged or fill material from "normal farming, silvicultural, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."

3. Section 404(f)(1)(A) is limited to activities that are part of an "established (i.e., ongoing) farming, silviculture, or ranching operation." This "established" requirement is intended to reconcile the dual intent reflected in the legislative history that although Section 404 should not unnecessarily restrict farming, forestry, or ranching from continuing at a particular site, discharge activities which could destroy wetlands or other waters should be subject to regulation.

4. EPA and Corps regulations [40 CFR 230 and 33 CFR 320] and preamble define in some detail the specific "normal" activities listed in Section 404(f)(1)(A). Three points may be useful in the current context:

> a. As explained in the preamble to the 1979 proposed regulations, the words "such as" have been consistently interpreted as restricting the section "to the activities *named* in the statute and other activities of essentially the same character as named," and "preclude the extension of the

exemption . . . to activities that are unlike those named." [44 FR 34264].

b. Plowing is specifically defined in the regulations *not* to include the redistribution of surface material in a manner which converts wetlands areas to uplands [See 40 CFR 233.35(a)(1)(iii)(D)].

c. Discharges associated with activities that establish an agricultural operation in wetlands where previously ranching had been conducted, represents a "change in use" within the meaning of Section 404(f)(2). Similarly, discharges that establish forestry practices in wetlands historically subject to agriculture also represent a change in use of the site [See 40 CFR 233.35(c)].

5. The statute includes a provision at Section 404(f)(2) that "recaptures" or reestablishes the permit requirement for those otherwise exempt discharges which:

a. convert an area of the waters of the U.S. to a new use, *and*

b. impair the flow or circulation of waters of the U.S. *or* reduce the reach of waters of the U.S.

Conversion of an area of waters of the U.S. to uplands triggers both provisions (a) and (b) above. Thus, at a minimum, any otherwise exempt discharge that results in the conversion of waters of the U.S. to upland is recaptured under Section 404(f)(2) and requires a permit. It should be noted that in order to trigger the recapture provisions of Section 404(f)(2), the discharges themselves need not be the sole cause of the destruction of the wetland or other change in use or sole cause of the reduction or impairment of reach, flow, or circulation of

waters of the U.S. Rather, the discharges need only be "incidental to" or "part of" an activity which is intended to or will forseeably bring about that result. Thus, in applying Section 404(f)(2), one must consider discharges in context, rather than isolation.

ISSUE:

1. Questions have been raised involving "deep-ripping" and related activities in wetlands and whether discharges associated with these actions fall within the exemptions at Section 404(f)(1)(A). In addition, the issue has been raised whether, if such activities fall within the exemption, they would be recaptured under Section 404(f)(2).

2. "Deep-ripping" is defined as the mechanical manipulation of the soil to break up or pierce highly compacted, impermeable or slowly permeable subsurface soil layers, or other similar kinds of restrictive soil layers. These practices are typically used to break up these subsoil layers (e.g., impermeable soil layer, hardpan) as part of the initial preparation of the soil to establish an agricultural or silvicultural operation. Deep-ripping and related activities are also used in established farming operations to break up highly compacted soil. Although deep-ripping and related activities may be required more than once, the activity is typically not an annual practice. Deep-ripping and related activities are undertaken to improve site drainage and facilitate deep root growth, and often occur to depths greater than 16 inches and, in some cases, exceeding 4 feet below the surface. As such, it requires the use of heavy equipment, including bulldozers, equipped with ripper-blades, shanks, or chisels

often several feet in length. Deep-ripping and related activities involve extending the blades to appropriate depth and dragging them through the soil to break up the restrictive layer.

3. Conversely, plowing is defined in EPA and Corps regulations [40 CFR 230 and 33 CFR 320] as "all forms of primary tillage . . . used . . . for the breaking up, cutting, turning over or stirring of soil to prepare it for the planting of crops" [40 CFR 232.3(d)(4)]. As a general matter, normal plowing activities involve the annual, or at least regular, preparation of soil prior to seeding or other planting activities. According to USDA, plowing generally involves the use of a blade, chisel, or series of blades, chisels, or discs, usually 8-10 inches in length, pulled behind a farm vehicle to prepare the soil for the planting of annual crops or to support an ongoing farming practice. Plowing is commonly used to break up the surface of the soil to maintain soil tilth and to facilitate infiltration throughout the upper root zone.

DISCUSSION:

1. Plowing in wetlands is exempt from regulation consistent with the following circumstances:

a. it is conducted as part of an ongoing, established agricultural, silvicultural, or ranching operation; and

b. the activity is consistent with the definition of plowing in EPA and Corps regulations [40 CFR 230 and 33 CFR 320]; and

c. the plowing is not incidental to an activity that results in the immediate or gradual conversion of wetlands to non-waters.

2. Deep-ripping and related activities are distinguishable from plowing and similar practices (e.g., discing, harrowing) with regard to the purposes and circumstances under which it is conducted, the nature of the equipment that is used, and its effect, including in particular the impacts to the hydrology of the site.

a. Deep-ripping and related activities are commonly conducted to depths exceeding 16 inches, and as deep as 6-8 feet below the soil surface to break restrictive soil layers and improve water drainage at sites that have not supported deeper rooting crops. Plowing depths, according to USDA, rarely exceed one foot into the soil and not deeper than 16 inches without the use of special equipment involving special circumstances. As such, deep-ripping and related activities typically involve the use of specialized equipment, including heavy mechanized equipment and bulldozers, equipped with elongated ripping blades, shanks, or chisels often several feet in length. Moreover, while plowing is generally associated with ongoing operations, deep-ripping and related activities are typically conducted to prepare a site for establishing crops not previously planted at the site. Although deep-ripping may have to be redone at regular intervals in some circumstances to maintain proper soil drainage, the activity is typically not an annual or routine practice.

b. Frequently, deep-ripping and related activities are conducted as a preliminary step for converting a "natural" system or for preparing

rangeland for a new use such as farming or silviculture. In those instances, deep ripping and related activities are often required to break up naturally-occurring impermeable or slowly permeable subsurface soil layers to facilitate proper root growth. For example, for certain depressional wetlands types such as vernal pools, the silica-cemented hardpan (durapan) or other restrictive layer traps precipitation and seasonal runoff creating ponding and saturation conditions at the soil surface. The presence of these impermeable or slowly permeable subsoil layers is essential to support the hydrology of the system. Once these layers are disturbed by activities such as deep-ripping, the hydrology of the system is disturbed and the wetland is often destroyed.

c. In contrast, there are other circumstances where activities such as deep-ripping and related activities are a standard practice of an established on-going farming operation. For example, in parts of the Southeast, where there are deep soils having a high clay content, mechanized farming practices can lead to the compaction of the soil below the soil surface. It may be necessary to break up, on a regular although not annual basis, these restrictive layers in order to allow for normal root development and infiltration. Such activities may require special equipment and can sometimes occur to depths greater than 16 inches. However, because of particular physical conditions, including the presence of a water table at or near the surface for part of the growing season, the activity typically does not have the effect of impairing the hydrology of the system or otherwise altering the wetland characteristics of the site.

CONCLUSION:

1. When deep-ripping and related activities are undertaken as part of an *established, ongoing* agricultural silvicultural, or ranching operation, to break up compacted soil layers *and* where the hydrology of the site will not be altered such that it would result in conversion of waters of the U.S. to upland, such activities are exempt under Section 404(f)(1)(A).

2. Deep-ripping and related activities in wetlands are *not* part of a normal, ongoing activity, and therefore *not* exempt, when such practices are conducted in association with efforts to establish for the first time (or when a previously established operation was abandoned) an agricultural, silvicultural or ranching operation. In addition, deep-ripping and related activities are not exempt in circumstances where such practices would trigger the "recapture" provision of Section 404(f)(2):

> a) Deep-ripping to establish a farming operation at a site where a ranching or forestry operation was in place is a change in use of such a site. Deep-ripping and related activities that also have the effect of altering or removing the wetland hydrology of the site would trigger Section 404(f)(2) and such ripping would require a permit.
>
> b) Deep-ripping a site that has the effect of converting wetlands to non-waters would also trigger Section 404(f)(2) and such ripping would require a permit.

3. It is the agencies' experience that certain wetland types are particularly vulnerable to hydrological alteration as a result of deep-ripping and related activities.

Depressional wetland systems such as prairie potholes, vernal pools and playas whose hydrology is critically dependent upon the presence of an impermeable or slowly permeable subsoil layer are particularly sensitive to disturbance or alteration of this subsoil layer. Based upon this experience, the agencies have concluded that, as a general matter, deep-ripping and similar practices, consistent with the descriptions above, conducted in prairie potholes, vernal pools, playas and similar depressional wetlands destroy the hydrological integrity of these wetlands. In these circumstances, deep-ripping in prairie potholes, vernal pools, and playas is recaptured under Section 404(f)(2) and requires a permit under the Clean Water Act.

/s/ Robert H. Wayland III
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Directorate of Civil Works
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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BORDEN RANCH PARTNERSHIP; ANGELO K. TSAKOPOULOS, Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States, Defendants-Appellees.	No. 00-15700 D.C. No. CV-97-00858-GEB (JFM) (Eastern California) ORDER (Filed Nov. 28, 2001)

Before: CANBY, HAWKINS, and GOULD, Circuit Judges.

Judge Canby recommended denying the petition for rehearing en banc. Judge Hawkins voted to deny the petition for rehearing en banc and Judge Gould voted to grant the same.

The full court was advised of the petition for rehearing en banc and no active judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

UNITED STATES CODE

1. 33 U.S.C. section 1311(a).

(a) Illegality of pollutant discharges except in compliance with law.

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

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2. 33 U.S.C. section 1319(d).

(d) Civil penalties; Factors considered in determining amount.

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this

subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

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3. 33 U.S.C. section 1344(a).

(a) Discharge into navigable waters at specified disposal sites.

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

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4. 33 U.S.C. section 1344(f)(1)(A).

(f) Non-prohibited discharge of dredged or fill material.

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material –

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices; is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for

effluent standards or prohibitions under section 1317 of this title).

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5. 33 U.S.C. section 1344(f)(2).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

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6. 33 U.S.C. section 1362(6).

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in

which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

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7. 33 U.S.C. section 1362(12).

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

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8. 33 U.S.C. section 1362(14).

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

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9. 33 U.S.C. section 1362(16).

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

CODE OF FEDERAL REGULATIONS

1. 33 C.F.R. section 323.2(d)(1)(iii).

(d)(1) Except as provided below in paragraph (d)(3), the term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following:

(iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

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2. 33 C.F.R. sections 323.2(d)(2)(i), 323.2(d)(2)(ii).

(2)(i) The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph (i) does not and is not

intended to shift any burden in any administrative or judicial proceeding under the CWA.

(ii) *Incidental fallback* is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

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3. 33 C.F.R. section 323.2(d)(3)(iii).

(3) The term *discharge of dredged material* does not include the following:

(iii) Incidental fallback.

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4. 33 C.F.R. section 323.2(d)(4)(iii).

(4) Section 404 authorization is not required for the following:

(iii) Certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under section 404. See 33 CRF [sic] 323.4 for discharges that do not require[d] [sic] permits.

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5. 33 C.F.R. sections 323.4(a)(1)(i), 323.4(a)(1)(ii).

§ 323.4 Discharges not requiring permits

(a) *General.* Except as specified in paragraphs (b) and (c) of this section, any discharges of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and for the harvesting production of food, fiber, and forest products or soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been co[n]verted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit,

whether or not it is part of an established farming, silviculture, or ranching operation.

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6. 33 C.F.R. section 323.4(a)(1)(iii)(D).

(D) *Plowing* means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetlands is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

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7. 40 C.F.R. section 232.2(4)(iii).

(4) Section 404 authorization is not required for the following:

(iii) Certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under Section 404.

See 40 CFR 232.3 for discharges that do not require permits.

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8. 40 C.F.R. sections 232.3(c)(1)(i), 232.3(c)(1)(ii).

(c) The following activities are exempt from section 404 permit requirements, except as specified in paragraphs (a) and (b) of this section:

(1)(i) Normal farming, silviculture and ranching activities such as seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (d) of this section.

(ii)(A) To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

(B) Activities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit

whether or not it was part of an established farming, silviculture or ranching operation.

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9. 40 C.F.R. section 232.3(d)(4).

(4) Plowing means all forms of Primary tillage, including moldboard, chisel, or wide blade plowing, discing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing, as described above, will never involve a discharge of dredged or fill material.

Supreme Court, U.S.
FILED
APR 29 2002

No. 01-1243

In the Supreme Court of the United States

BORDEN RANCH PARTNERSHIP AND
ANGELO K. TSAKOPOULOS, PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND
ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether deep ripping, an activity that disgorges and redeposits soil in wetlands and waters of the United States to convert those areas to dry land, may result in a discharge of a pollutant for purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Whether petitioners' deep ripping of a wetland qualified for the conditional exemption from regulation under Section 404(f) of the Clean Water Act, 33 U.S.C. 1344(f).

3. Whether each violation of the Clean Water Act should be counted in determining the maximum civil penalty under Section 309(d) of the Clean Water Act, 33 U.S.C. 1319(d).

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In the Supreme Court of the United States

No. 01-1243

BORDEN RANCH PARTNERSHIP AND ANGELO K. TSAKOPOULOS, PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 261 F.3d 810. The district court's amended order on cross-motions for summary judgment (Pet. App. 28-56) and its findings of fact and conclusions of law (Pet. App. 67-121) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2001. A petition for rehearing was denied on November 28, 2001 (Pet. App. 208). The petition for a writ of certiorari was filed on February 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners engaged in a practice known as "deep ripping" to convert ranch land to vineyards and orchards. The Environmental Protection Agency (EPA) issued an administrative order under the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, to halt that activity on wetland areas. Petitioners filed a suit challenging the authority of EPA and the United States Army Corps of Engineers (the Corps) to regulate that activity, and the government counterclaimed, seeking injunctive relief and civil penalties in response to petitioners' CWA violations. The district court ruled that the government had authority under the CWA to regulate deep ripping and granted the government's request for injunctive relief and civil penalties. The court of appeals affirmed the district court's determinations that the government had authority to regulate deep ripping and that petitioners violated the CWA, but reversed the district court's finding of liability as to one isolated pool on petitioners' property and consequently remanded the case for recalculation of the civil penalty.

1. Congress enacted the Clean Water Act "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve that objective, Section 301(a) of the CWA prohibits the discharge of any pollutant into navigable waters, except in accordance with the pertinent provisions of the CWA. 33 U.S.C. 1311(a). The CWA defines the term "pollutant" to include a wide variety of materials, including dredged spoil, biological materials, rock, sand, and cellar dirt. 33 U.S.C. 1362(6) (Supp. V 1999). The CWA further defines the "discharge of pollutants" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A).

Section 309(d) of the CWA provides that any person who violates Section 301 "shall be subject to a civil penalty not to exceed $25,000 per day for each violation." 33 U.S.C. 1319(d).

Section 301(a) of the CWA specifically forbids any discharge of dredged or fill materials from a point source into "waters of the United States," including wetlands (sometimes called "jurisdictional waters"), unless authorized by a permit issued by the the Corps pursuant to Section 404 of the CWA, 33 U.S.C. 1344 (1994 & Supp. V 1999). 33 U.S.C. 1311(a). See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). The CWA regulates discharges into wetlands because those waters "maintain[] water quality by trapping sediment and toxic and nontoxic pollutants before they reach streams, rivers, or other open bodies of water." *United States* v. *Deaton*, 209 F.3d 331, 336 (4th Cir. 2000).

Section 404(f)(1) of the CWA provides an exception from the permitting requirement, known as the normal farming exemption, for "the discharge of dredged or fill material * * * from normal farming, silviculture, and ranching activities such as plowing." 33 U.S.C. 1344(f)(1) and (1)(A). Nevertheless, such discharges that are "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under [Section 404.]" 33 U.S.C. 1344(f)(2). The latter provision is referred to as the "recapture" provision.

2. The district court based its decision on detailed findings of fact, Pet. App. 67-92, which the court of appeals affirmed, *id.* at 11-12. Because petitioners' char-

acterization of the case relies on testimony and exhibits that the district court did not credit and in some respects specifically rejected as "not veracious" (*id.* at 73 n.2), we set out the facts, as found by the district court, in some detail. We also rely on undisputed facts set out in the district court's amended order granting partial summary judgment (*id.* at 28-56).

In June 1993, petitioner Tsakopoulos, the general partner of petitioner Borden Ranch Partnership, purchased Borden Ranch, an 8348-acre ranch located in California's Central Valley, for approximately $8.3 million. Pet. App. 2, 68. The ranch contained significant hydrological features, including vernal pools, swales, and intermittent drainages. *Id.* at 2, 68-69. Vernal pools are waters that generally occur at low points in the landscape where restrictive soil layers (or "claypans") cause water to collect and commonly serve as habitat for a distinctive mix of plants and animals adapted to the variation between wet and dry periods. *Id.* at 2, 69. Swales are sloped wetlands that allow the movement of vernal pool plants and animals to other aquatic features, slow peak water flows, filter water flows to maintain water quality, and minimize erosion and sedimentation. *Ibid.* The swales on Borden Ranch connect vernal pools to each other or to intermittent streams, which flow into creeks on the property, which in turn are tributaries of the Cosumnes and Mokelumne Rivers. *Id.* at 69.

Tsakopoulos intended to convert the relevant portions of Borden Ranch, which had previously been used as rangeland for cattle grazing, into vineyards and orchards and to subdivide it into smaller parcels for sale. Pet. App. 2, 44, 47, 68. Vineyards and orchards, however, have deep root systems that require water to penetrate much deeper than the restrictive layers in

the relevant parts of Borden Ranch allowed. *Id.* at 2, 44, 69. Their cultivation therefore requires "deep ripping," a process in which bulldozers drag rippers, consisting of four-foot to seven-foot metal prongs, through the earth. That activity breaks up the restrictive layer and disgorges earth, rock, sand, and biological material behind the ripper. *Id.* at 2-3, 44, 69-70. Deep ripping alters the movement of surface and subsurface water and limits or destroys the ability of wetlands to retain water. *Id.* at 48, 70.

Petitioner Tsakopoulos knew when he purchased Borden Ranch that it contained waters protected under the CWA and was informed by the Corps in mid-1993 that he would need to obtain a permit for deep ripping in those waters. Pet. App. 70-71. In fall 1993, he initiated deep ripping without a permit on a portion of the Ranch. *Id.* at 3, 71-72. The Corps subsequently granted him an "after-the-fact" permit for this deep ripping when he agreed to undertake certain mitigation activities. *Id.* at 3, 72.

The Corps and EPA again informed Tsakopoulos in fall 1994 that he was not to deep rip in protected waters, but the agencies discovered the following spring that more deep ripping had occurred without a permit. Pet. App. 3, 72-74.[1] The Corps thereupon issued a cease and desist order. *Id.* at 3, 74. In summer

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[1] Petitioners assert that the Corps "conceded" in late 1994 that "shallow plowing at root zone depth"—or discing—did not require a permit. Pet. 10. That assertion is inconsistent with the district court's findings after trial: "Tsakopoulos testified at the bench trial that the agency officials had stated at this meeting [in late September 1994] that the vernal pools could be legally disced without a permit. That testimony was not veracious and is belied by the consistent position federal officials expressed to Tsakopoulos on this matter." Pet. App. 73 n.2.

1995, Tsakopoulos initiated further deep ripping on other parcels of the Ranch without a permit, and in November 1995, the Corps determined that more protected wetlands had been ripped and issued another cease and desist order. *Id.* at 3, 74-75. In May 1996, the government entered into an Administrative Order on Consent (AOC) with Tsakopoulos that was intended to resolve his alleged CWA violations affecting 49.1 acres of waters of the United States. *Id.* at 3, 77. In the AOC, Tsakopoulos agreed to cease further discharges into waters of the United States unless he had appropriate authorization under the CWA. *Id.* at 78.

Further deep ripping of waters on Borden Ranch without a permit occurred in November 1996 and in spring 1997. Pet. App. 4, 79-80, 82-83. After EPA investigators visited the Ranch in April 1997 and observed fully-engaged rippers at work in jurisdictional wetlands, EPA issued an Administrative Order finding that Tsakopoulos had violated the CWA. *Id.* at 4, 83-84. In a meeting later that month, Tsakopoulos conceded that "mistakes had been made." *Id.* at 11, 85.[2]

3. Petitioners filed this action challenging the authority of the Corps and EPA to regulate petitioners'

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[2] Petitioners claim that "[r]elying on the Corps' oral and written advice, Tsakopoulos tried to plow in ways the Corps told him would not require CWA permits." Pet. 9. The district court's findings after trial do not support that claim:

> Tsakopoulos deliberately obfuscated his understanding of the Corps' guidance respecting driving over vernal pools and undermined the Corps' enforcement authority by wrongly stating that the agency gave him confusing guidance as to the nature of the contact he could have with jurisdictional waters. He knew he was not authorized to deep rip any jurisdictional features. These findings weigh against good faith.

Pet. App. 114.

deep ripping, which precipitated EPA's counterclaim, seeking injunctive relief and civil penalties for CWA violations in connection with petitioner Tsakopoulos' degradation and destruction of protected waters. Pet. App. 4. The parties cross-moved for summary judgment, and the district court granted partial summary judgment in favor of the government. *Id.* at 28-56. The district court dismissed petitioners' claims and held that petitioners' activities are subject to the Section 404 permitting process because they "may cause discharge of fill material or pollutant into waters of the United States." *Id.* at 41. The district court further held that petitioners' activities did not qualify for Section 404(f)(1)'s normal farming exemption, *id.* at 42-47, and that, even if they did, those activities were recaptured under Section 404(f)(2), *id.* at 47-49. The district court determined, however, that there remained disputed facts concerning the extent and effects of particular instances of deep ripping. *Id.* at 5, 41.

The district court resolved those factual issues through a four-week bench trial in which the court heard evidence from more than 20 witnesses and received hundreds of documentary exhibits. Pet. App. 5. The district court determined that petitioners' deep ripping had filled approximately two acres of jurisdictional wetlands and resulted in 358 CWA violations. *Id.* at 5, 103, 105. Although the district court observed that "[t]he relative seriousness of Tsakopoulos' violations and his lack of earnest effort to comply with the Act merit a significant penalty" (*id.* at 117), the court did not assess the maximum civil penalty of $8,950,000 and, instead, gave him the choice of paying a $1.5 million civil penalty or paying a $500,000 penalty and restoring four acres of wetlands. *Id.* at 5, 105. Tsakopoulos chose the latter option. *Id.* at 5.

4. The court of appeals affirmed "the district court's holding that deep ripping in this context is subject to the jurisdiction of the Corps and the EPA." Pet. App. 17. It noted that the courts of appeals have consistently held that redeposit of materials into waters of the United States can constitute an "addition of a pollutant" under the CWA. *Id.* at 6-8. It further stated that petitioners' contention "that no case has ever held a plow to be a point source * * * has no merit" because in this case, bulldozers and tractors were used to pull large metal prongs through the soil, and courts have found that bulldozers and other earthmoving equipment can constitute "point sources." *Id.* at 8-9.

The court of appeals rejected petitioners' contention that their deep ripping was exempt from regulation under Section 404(f)(1)'s normal farming exemption. Pet. App. 9-10. The court observed that the exemption is subject to a "significant qualifying provision", because "even normal plowing can be regulated under the Clean Water Act if it falls under this so-called 'recapture' provision" in Section 404(f)(2). *Id.* at 9. The court of appeals agreed with the district court that "[c]onverting ranch land to orchards and vineyards is clearly bringing the land 'into a use to which it was not previously subject,' and there is a clear basis in this record to conclude that the destruction of the soil layer at issue here constitutes an impairment of the flow of nearby navigable waters." *Id.* at 10. The court accordingly "conclud[ed] that the deep ripping at issue in this case is governed by the recapture provision" and that it was "entirely proper" for the government to exercise jurisdiction over petitioners' deep ripping. *Ibid.*

The court of appeals also affirmed the district court's calculation of the civil penalty. Pet. App. 12. It rejected petitioners' argument that they should only be

assessed $25,000 for any day in which ripping violations occurred regardless of the total numbers of rippings in the day, noting that the focus in the statutory penalty provision "is clearly on *each* violation" and that a contrary rule would encourage violators to "stack" violations on particular days. *Id.* at 13. The court of appeals concluded that petitioners' other challenges to the civil penalty assessment, none of which they raise here, lacked merit. *Id.* at 12.

The court of appeals reversed the district court's findings of CWA violations in one isolated vernal pool in light of the government's withdrawal of its enforcement claim with regard to that pool as a result of this Court's decision in *Solid Waste Agency* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001). The court accordingly remanded the case to the district court for recalculation of the civil penalty. Pet. App. 10-11, 17. Judge Gould dissented. *Id.* at 18-22. He would have held "that the district court erred in finding that the activities here required a permit and otherwise violated the Clean Water Act." *Id.* at 22.

ARGUMENT

The court of appeals correctly concluded that petitioners violated the CWA and that the district court properly calculated an appropriate civil penalty. That decision does not conflict with any decision of this Court or of another court of appeals. The court of appeals' fact-specific decision does not raise any issue of exceptional importance warranting review by this Court.

1. The court of appeals correctly determined that "deep ripping, when undertaken in the context at issue here, can constitute a discharge of a pollutant under the Clean Water Act." Pet. App. 8. That determination reflects established law. Deep ripping is an activity in

which soil is "wrenched up, moved around, and redeposited somewhere else." *Ibid.* The courts of appeals have consistently recognized that activities in which dirt or similar organic material is disturbed or dug up and then redeposited may constitute an "addition" of a pollutant under the CWA if they occur in a water of the United States. See *United States* v. *Deaton*, 209 F.3d 331, 336-337 (4th Cir. 2000) (sidecasting dirt from ditch digging in wetland); *Rybachek* v. *United States EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (dirt and gravel excavated from a streambed for placer mining and then returned there); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 923-925 (5th Cir. 1983) (redeposit of trees and vegetation dug up during land clearing). As the Fourth Circuit explained in *Deaton*, the question under the CWA is not whether "material" has been added to waters, but whether a "pollutant" has been added, and "plain dirt," once it has been disgorged, can become a pollutant. 209 F.3d at 335-336. Like other fill materials, it can harm a wetland and associated aquatic life by interfering with water circulation and filtration. Pet. App. 6-8 (quoting *Deaton* and citing other cases).

Petitioners nevertheless assert (Pet. 16-20) that the court of appeals' decision conflicts with *National Mining Ass'n* (*NMA*) v. *United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). Petitioners are mistaken. *NMA* involved a challenge to a regulation known as the "*Tulloch* Rule," which subjected certain redeposits of dredging material, known as "incidental fallback," to CWA regulation. *Id.* at 1402. As the court of appeals in *NMA* explained, the term "incidental fallback" describes de minimis redeposits of soil during dredging operations, such as "when a bucket used to excavate material from the bottom of a river, stream, or wetland is raised and soils or sediments fall

from the bucket back into the water." *Id.* at 1403. The *NMA* court ruled that the Corps' decision to subject incidental fallback to its permitting requirements exceeded the Corps' authority to regulate the "addition" of "dredged material" into the waters of the United States because "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion happens to fall back." *Id.* at 1403-1404. The court, however, expressly stated:

> [W]e do not hold that the Corps may not legally regulate some forms of redeposit under its §404 permitting authority. We hold only that, by asserting jurisdiction over "*any* redeposit," including incidental fallback, the *Tulloch* Rule outruns the Corps's statutory authority.

Id. at 1405. The Court specifically distinguished cases such as *Avoyelles* and *Rybachek*, cited above, as not involving incidental fallback, but regulable redeposits. *Id.* at 1406. The same distinction applies here.

The court of appeals correctly concluded in this case that, "[h]ere, the deep ripping does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable deposit." Pet. App. 8 n.2. The court of appeals' conclusion rests solidly on the district court's factual findings that deep ripping moved earth, rock, sand and biological material both horizontally and vertically and that petitioners' deep ripping in this case filled approximately two acres of jurisdictional wetlands on Borden Ranch. *Id.* at 6-8, 70, 105. There is no serious question that fill activities of that character and magnitude are subject to CWA regulation. The *NMA* court itself specifically recog-

nized that activities such as "plowing, ditch maintenance, and the like" are distinguishable from the release of incidental fallback because they "may produce fallback, but they may also produce actual discharges, i.e. additions of pollutants." 145 F.3d at 1405. Thus, both the court of appeals in this case and the *NMA* court clearly perceived the distinction between incidental fallback and the type of activity involved here. To the extent that petitioners disagree with the lower courts' factual characterization of their deep ripping activities, that factual disagreement plainly does not present any issue warranting this Court's review.

2. Petitioners further contend (Pet. 20-21) that the court of appeals erred in holding that "plows" may constitute "point sources" (*ibid.*). The court of appeals correctly rejected petitioners' characterization of the activity involved here. Pet. App. 8-9. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any * * * rolling stock * * * from which pollutants are or may be discharged." 33 U.S.C. 1362(14). As the court of appeals explained, the "point sources" in question here were the bulldozers and tractors pulling large metal prongs through the earth, wrenching the soil up, moving it around, and redepositing it somewhere else. Pet. App. 8-9. The courts have uniformly held that such earthmoving equipment may constitute point sources. See *United States* v. *Akers*, 785 F.2d 814, 817-820 (9th Cir.) (upholding issuance of injunction in CWA case involving rippers), cert. denied, 479 U.S. 828 (1986); *Avoyelles*, 715 F.2d at 922 (bulldozers and backhoes); see also *In re Alameda County Assessor's Parcel*, 672 F. Supp. 1278, 1284-1285 (N.D. Cal. 1987) (same); *United States* v. *Larkins*, 657 F. Supp. 76, 84-85 (W.D. Ky. 1987) (same), aff'd, 852 F.2d 189 (6th Cir. 1988),

cert. denied, 489 U.S. 1016 (1989). Petitioners do not cite any court of appeals decision that conflicts with that holding. And even accepting arguendo their inaccurate characterization of the facts here, petitioners cite no cases supporting their assertion that a plow cannot be a point source.

3. Petitioners next assert (Pet. 21-27) that the court of appeals erred in concluding that their activities did not fall within the "normal farming exemption." Petitioners' principal contention is that Congress never intended plowing to be regulated under the CWA and "never even considered it to produce 'discharges.'" Pet. 25. They are wrong. Section 404(f) of the CWA expressly recognizes that plowing can result in discharges of dredged or fill material 33 U.S.C. 1344(f). Section 404(f)(1)'s normal farming exemption states:

> (1) Except as provided in paragraph (2) of this subsection, *the discharge of dredged or fill material–*
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> (A) *from normal farming*, silviculture, and ranching activities *such as plowing*, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices; * * *
>
> is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title.

33 U.S.C. 1344(f)(1) (emphasis added). Thus, Section 404(f)(1) recognizes that normal farming practices, such as plowing, may result in discharges of dredged or fill material, but it creates a conditional exemption for those discharges. Section 404(f)(2), the recapture provision, makes clear that the conditional exemption is

not available if the plowing at issue alters the hydrological regime of protected waters:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. 1344(f)(2). Thus, to qualify for the conditional exemption, one must demonstrate "that proposed activities both *satisfy* the requirements of Section 404(f)(1) and *avoid* the recapture provision of Section 404(f)(2)." *United States* v. *Brace*, 41 F.3d 117, 124 (3d Cir. 1994), cert. denied, 515 U.S. 1158 (1995); see *Akers*, 785 F.2d at 819; *Avoyelles*, 715 F.2d at 925. The courts of appeals have uniformly held that the normal farming exemption, as well as other exemptions under Section 404(f)(1), are to be construed narrowly. *Brace*, 41 F.3d at 124; *Akers*, 785 F.2d at 819; *United States* v. *Huebner*, 752 F.2d 1235, 1240-1241 (7th Cir.), cert. denied, 474 U.S. 817 (1985); *Avoyelles*, 715 F.2d at 925 n.44.

Petitioners also raise a number of fact-based challenges to the lower courts' application of the normal farming exemption and the recapture provision. Pet. 23-24, 25-26. Those challenges are without merit. For example, petitioners assert that the court of appeals "erroneously reasoned that '[c]onverting ranch land to orchards and vineyard is clearly bringing the land into a use to which it was not previously subject.'" Pet. 23-24. The lower courts found, however, as a matter of fact, that petitioners' activities "were not intended simply to

substitute one wetland crop for another; rather, they radically altered the hydrological regime of the protected wetlands." Pet. App. 10.[3]

The courts of appeals have consistently held that converting from silviculture to soybean production, and even from wetlands farming to dryland farming, can subject the activities in question to recapture under Section 404(f)(2). See *Akers*, 785 F.2d at 822-823 (wetlands to dryland farming); *Huebner*, 752 F.2d at 1240 (cranberries to barley, corn and other dryland crops); *Avoyelles*, 715 F.2d at 925 (forest to soybean production). See also *Brace*, 41 F.3d at 129 (conversion of pasturing of cattle and horses to cropping operation not exempted under Section 404(f)(1) and would be recaptured under Section 404(f)(2) in any event). Those decisions demonstrate that the courts have followed an intensely factual, case-by-case approach in determining the application of Section 404(f)(2). The court of appeals in this case correctly recognized, consistent with settled law, that when "plowing" is employed to

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[3] Petitioners claim that the court of appeals "confused the normal activity of converting from one agricultural crop to another with that of converting waters to wetlands." Pet. 23. However, petitioners did not convert from one crop to another—they converted from ranching to planting crops and their conversion activities radically altered the hydrological regime of protected waters and wetlands. Pet. App. 10. Petitioners also suggest that the court of appeals' holding means that "any change in agricultural crop or practice could subject plowing to federal regulation" (Pet. 24), but the court of appeals stated that this was not the case. See Pet. App. 10. Significantly, the dissenting opinion acknowledges that, if deep ripping can be viewed as a discharge, the recapture provision "defeats the exemption for any deep ripping that had the purpose of transforming land" and that here, "[m]ost violations found by the district court involved a purposeful attempt to transform the land." *Id.* at 21 (Gould, J., dissenting).

change an area's hydrological regime to the point that the wetlands or other waters are converted to dry land, any exemption that the plowing might otherwise have enjoyed is lost.[4] Petitioners assert at various points that the government's regulations exempt all forms of plowing from regulation. See Pet. 4, 8, 9, 19, 25. Petitioners, however, fail to quote the relevant regulations in their entirety. Those regulations state that the term "plowing" does "not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland." 33 C.F.R. 323.4(a)(1)(iii)(D); 40 C.F.R. 232.3(d)(4). Petitioners do not challenge the district court's factual finding that the deep ripping in this case redistributed soil and other surficial materials in a manner such that the hydrology of the affected waters "has been altered significantly" and that several of the waters were "completely obliterated." Pet. App. 106. Accordingly, the regulations relied upon by petitioners do not apply to their deep ripping.

Petitioners also rely on the Corps' definition of "fill material" to contend that plowing does not result in a discharge of fill material because its "primary purpose[] is to enhance and revitalize farming soil." Pet. 19. See 33 C.F.R. 323.2(e) (defining "fill material" to mean "any

[4] Petitioners assert (Pet. 26-27) that the court of appeals' decision conflicts with *Solid Waste Agency* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001), to the extent that the court of appeals "unduly deferred" to EPA's application and interpretation of the CWA and EPA's own regulations. That supposed conflict is chimerical. The court of appeals did not cite any EPA regulations or defer to EPA at any point in its decision. Moreover, the court of appeals followed the holding in *Solid Waste Agency* in reversing the district court's findings of CWA violations with regard to one isolated vernal pool. Pet. App. 11.

material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an *[sic]* waterbody"). The court of appeals in *Avoyelles* rejected a similar argument, stating that the defendants' landclearing activities, however the defendants might choose to characterize them, in fact "'chang[ed] the bottom elevation of [the] waterbody'" and "were designed to 'replace the aquatic area with dry land.'" 715 F.2d at 924-925 (quoting 33 C.F.R. 323.2(e)). That is likewise what occurred in this case. See, *e.g.*, Pet. App. 43-45.[5]

4. Petitioners mistakenly claim (Pet. 27-28) that the court of appeals erred in affirming the district court's calculation of the maximum civil penalty that might be assessed against them. The district court properly calculated the maximum civil penalty in accordance with established law by multiplying the statutory maximum amount by the number of individual violations. See Pet. App. 16, 102-104. The court of appeals affirmed the district court's "careful analysis of the penalty issue on the facts of this case," remanding it only for a determination of "what, if any, reduction in the penalty is

[5] Petitioners admitted in their request for summary judgment that their plowing "unavoidably and *by design* changes the 'hydrological regime' of land by allowing surface water to penetrate more deeply into the soils." E.R. 434 n.17 (emphasis added). See *id.* at 465 para. 8 (deep ripping is required before planting vineyards and orchards because those crops "require water to penetrate down into the root zone"). As a result, petitioners' deep ripping met the requirements of the Corps' definitions of "discharge of fill material." Petitioners are wrong in suggesting (Pet. 6, 19) that this case bears any similarity to *Resource Investments, Inc.* v. *United States Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998). In that case, the court determined that the placement of a municipal solid waste landfill was not intended to change the hydrological regime of the wetland. *Id.* at 1168.

appropriate" with regard to the vernal pool withdrawn from the case. *Id.* at 16, 17.

Section 309(d) of the CWA provides that any person who violates Section 301 of the Act "shall be subject to a civil penalty not to exceed $25,000 per day for each violation" and specifies several factors to be considered in determining the ultimate penalty amount. 33 U.S.C. 1319(d). In this case, the district court noted that "[t]he parties apparently agree that each pass [of the ripper] constitutes a separate violation," Pet. App. 103, and it accordingly counted the number of times the deep ripper passed through protected waters and multiplied that number by $25,000, arriving at a maximum statutory penalty of $8,950,000. *Id.* at 103-104. That court also considered the number of days that petitioners were in violation in determining the penalty, stating that "the day on which a discharge occurred is the only day that will be counted in determining the maximum penalty." *Id.* at 102-103. It then analyzed the factors identified in Section 309(d) and reduced that amount to $1.5 million, giving Tsakopoulos the option, which he ultimately chose, to reduce the penalty even further to $500,000, provided that he agree to undertake restoration of four acres of wetlands. See *id.* at 104-118, 129.

Petitioners' contention that the lower courts misread the statute are without merit. Contrary to their argument that the lower courts "read the words 'per day' out of the statute," Pet. 28, the district court explicitly considered how to calculate the number of days in determining the penalty, Pet. App. 102-103. Moreover, Section 309(d) states that a maximum penalty of $25,000 shall be imposed "per day for each violation," 33 U.S.C. 1319(d)—not "per day for each category of violation" or "per daily violation unit," as petitioners contend (Pet. 28). As the court of appeals observed, "[t]he

focus is clearly on *each* violation, and courts have consistently rejected attempts to limit civil penalties to the number of days in which violations occur." Pet. App. 13.

For example, in *Atlantic States Legal Foundation, Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990), the court stated that "there is no daily cap of $25,000," and that "*each* excessive discharge of a pollutant on a given day will subject the polluter to a $25,000 maximum fine." *Id.* at 1139. Petitioners' approach, which would focus instead on the "*daily violation units*" or "*categories* of CWA violations" (Pet. 28), is plainly at odds with *Tyson Foods*. As the court of appeals explained, under petitioners' approach a defendant who unlawfully deep ripped hundreds of times through hundreds of acres of wetlands in a single day would be subject to the same maximum penalty as someone who ripped through one wetland on a single occasion—$25,000. Pet. App. 13. See *United States* v. *Smithfield Foods, Inc.*, 191 F.3d 516, 528 (4th Cir. 1999) (noting incentive problems with limiting maximum penalty to $25,000 per day).[6]

Petitioners' reliance (Pet. 28-29) on *Chesapeake Bay Foundation, Inc.* v. *Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), is misplaced. This Court vacated that decision in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), and it therefore does not create a genuine conflict

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[6] Petitioners mistakenly rely (Pet. 28, 29) on *Hawaii's Thousand Friends* v. *City & County of Honolulu*, 821 F. Supp. 1368 (D. Haw. 1993). The district court in that case did not place a maximum $25,000 per day cap on penalties, holding instead that multiple violations attributable to a single day would each be assessed the maximum penalty of $25,000. *Id.* at 1395.

among the courts of appeals. In any event, the decision is not relevant here because it discusses a version of Section 309(d) that is no longer in force. (The same is true of *United States* v. *Amoco Oil Co.*, 580 F. Supp. 1042, 1046 n.1 (W.D. Mo. 1984), also cited by petitioners (Pet. 29).) The statutory provision at issue here—imposing a penalty of "$25,000 per day for each violation"—did not come into effect until 1987. *Tyson Foods*, 897 F.2d at 1138-1139. In any event, as the court of appeals noted, the court in *Chesapeake Bay Foundation* explicitly declined to reach the question presented in this case, which is "whether multiple violations attributable to a single day may give rise to a maximum penalty in excess of [the penalty amount] for that day." Pet. App. 13-14 (quoting *Chesapeake Bay Found.*, 791 F.2d at 308 n.8).

As this Court has stated, CWA penalty calculations are "highly discretionary." *Tull* v. *United States*, 481 U.S. 412, 427 (1987). The court of appeals considered petitioners' objections to the district court's penalty assessment and determined that "it is impossible to conclude that the district court's careful analysis of the penalty issue on the facts of this case was an abuse of discretion." Pet. App. 17. Petitioners' challenges to that penalty assessment present no issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS,

Petitioners,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS; UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

1. The government **concedes** Respondents' jurisdiction to regulate the normal farming activity of deep plowing[1] under Clean Water Act ("CWA") § 404 depends on the statutorily-required element of "**addition**" of a pollutant to navigable waters. Opp. Br. 10. Yet it pays mere lip service to this requirement, and cites only cases involving different issues and activities *vastly different* from deep plowing. In its discussion of *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), the government focuses wholly on the word "pollutant" and ignores the word "added." Opp. Br. 10. Rather than normal farming activities, *Deaton* involved "sidecasting" from backhoe dredging of a drainage ditch to drain wetlands for residential development. *United States v. Deaton, supra*, 209 F.3d at 333-336. Deep plowing, unlike "sidecasting" with a mechanized backhoe shovel, does not collect, hold and transport or convey large quantities of earth to a completely different location. Similarly, *Rybachek's* in-stream placer mining involved *extraction, removal* and *processing* of raw materials from a stream bed, and the later return of processed overburden to a different spot in the stream – activities qualitatively different than turning native farm soil in place. *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990).

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[1] Deep plowing, or "deep ripping," is a normal farming activity. See, e.g., Brief *Amicus Curiae* of the American Farm Bureau Federation In Support of Petitioners at 15-17; Brief Amicus Curiae of California Farm Bureau Federation, California Cattlemen's Association, and Pacific Legal Foundation In Support of Petition for a Writ of Certiorari at 2 ("California is home to eight of the top ten United States farm counties and in every single one of them deep plowing is a long practiced, normal farming activity.").

Nor is deep plowing is more analogous to the land clearing activities in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983) – *earthmoving, excavation* and *ditching* with engaged bulldozer blades and shovels, *id.* at 901, 920-921, 926-927 – than it is to the "incidental fallback" of native materials in *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998).[2] When the government's cases are fairly examined in light of what was "added" in each, it is clear that plowing is far more similar to *National Mining*'s unregulated incidental fallback than to any activities ever held regulated under CWA § 404 prior to this case.

The government essentially concedes the term "addition" cannot be stretched to cover movement of soil in place when it endorses the Ninth Circuit's new "effects" test, i.e., that "deep ripping does not involve mere incidental fallback but *constitutes environmental damage sufficient to constitute a regulable deposit* [sic]." Opp. Br. 11, emph. added.[3] First, "sufficient environmental damage" is *not* the test for CWA § 404 jurisdiction; rather, "**addition**" of a pollutant is the test. *See* Pet. at 18; fn. 3, ante; NAHB Amicus Br. at 5-7. Under the Ninth Circuit's new judicially-legislated and subjective standard of sufficient "environmental damage," no farming activity altering the natural environment in any way would be exempt. It is no wonder amici American Farm Bureau Federation, California Farm Bureau Federation and California Cattlemen's Association are so concerned.[4]

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[2] Deep plowing does not even involve dredging or excavation. See, e.g., Brief of Amicus Curiae National Association of Home Builders in Support of Petitioners, at 8-10.

[3] The Ninth Circuit's opinion actually referred to "a regulable redeposit," signifying that soil had simply been turned in place. *See* Pet. App. 8, n.2, partial emph. added.

[4] The Ninth Circuit's decision "is devastatingly incompatible with the day to day needs of normal farming operations." CFBF, CCA and PLF Amicus Br. at 1. "Many CCA members are terrified that their ability to continue to graze and grow crops on their lands, indeed their very right to maintain viable agricultural operations, will be seriously undermined if the common activity of deep plowing in these areas may not go forward without a permit from the federal bureaucrats." *Id.* at 3-4. "[T]he Ninth Circuit's decision . . . result[s] in expansive, intrusive and overreaching federal regulatory authority over normal farming and ranching activities which Congress never intended to regulate at all under the CWA." AFBF Amicus Br. at 4.

Second, the government's reference to "factual findings" that plowing "moved" soil "both horizontally and vertically" misses the point. *All* plowing has that characteristic,[5] and the "incidental fallback" over which the Corps has no CWA § 404 jurisdiction likewise consists of soil being moved around. But, like plowing, and unlike the activities in *Deaton, Rybachek* and *Avoyelles*, unregulated activities producing incidental fallback essentially move soil in place. The legal issue is whether such turning or movement of soil in place constitutes an "addition," and on that question there is a conflict among the circuit courts.

The government wrests from context dicta in *National Mining* that plowing "may [or may not] produce . . . actual discharges," Opp. Br. 12, without explanation of *how* plowing could produce "additions" of pollutants under CWA § 404. The government fails to explain its own **completely contrary assertions** in *National Mining* that plowing and other exempt farming activities produce ***nothing more than "incidental fallback."*** *National Mining, supra*, 145 F.3d at 1405; Pet. 18-19. There is no plausible distinction whereby incidental fallback is not an addition, but soil turned in place by plowing –

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[5] "Plowing" is the "breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops." 33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4). An activity cannot meet this definition and *not* "move" soil "vertically and horizontally."

expressly exempt by statute and regulation – is an addition. Perhaps the "intensely factual, case-by-case approach" advocated by the government for determining its jurisdiction, Opp. Br. 15, allows it to recharacterize the effects of plowing (or other normal farming activities) as either "incidental fallback" or an "addition" of pollutants on a case-by-case basis, according to regulatory whim. Firmer legal ground for federal regulation is warranted and required by the CWA.

2. The government concedes the discharge must come from a "point source" and tacitly concedes no prior case has ever held a *plow* is a "point source," but sidesteps the real issue by adopting the Ninth Circuit majority's illogical position that the "point sources" here were the "bulldozers and tractors *pulling* [deep ripping plows]." Opp. Br. 12, emph. added. All plows are pulled by tractors, the modern mechanical successors to horses and oxen. Yet tractors are not "confined and discrete conveyances" or "point sources" in and of themselves, in abstraction from and without reference to the nature of their attachments which actually work the soil. It is undisputed the tractors here did not operate as bulldozers, with engaged shovels or grading blades. They simply pulled deep *plows* which broke up, cut, stirred and turned over soil in place – quintessential *plowing*. 33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4).

The courts have *not* "uniformly held that *such* earthmoving equipment [i.e., tractors pulling plows] may constitute point sources." Opp. Br. 12, emph. added; *see* Pet. 20-21. The government's statement that *Akers* involved "rippers" is **false**. Cf. Opp. Br. 12 with *United States v. Akers*, 785 F.2d 814, 817-820 (9th Cir. 1986).[6] Each of the other "point source"

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[6] *Akers* involved "extensive [*dike building,*] *grading, leveling, drainage* and *water diversion* to convert [2,889 acres of] wetlands to farmland suitable for growing upland crops." *Id.* at 816-817. The Ninth Circuit there *refused* to endorse the government's extreme argument that "discing of soil" by a tractor pulling discs constituted a "point source" of pollutants. *Id.* at 820; *see also id.* at 819.

cases it cites is also distinguishable with respect to both the regulated equipment and activities involved.[7] Respondents' inaccurate characterization of the cases fails to support their assertion that a plow can be a point source.

3. Petitioners disagree with the government's unwarranted inference that the very existence of the CWA § 404(f)(1) farmer exemptions means Congress believed plowing produced "discharges." This untenable position ignores that the *National Mining* court, in addressing the farmer exemptions, was "reluctant to draw any inference other than that Congress emphatically did not want the law to impede these bucolic pursuits." *National Mining, supra*, 145 F.3d at 1405.[8]

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[7] *See Avoyelles, supra*, 715 F.2d at 926 (landowner cut timber and vegetation with bulldozers with *shearing blades, pushed,* burned, raked and disced *materials into land's low spots to raise and level it,* and *dug a drainage ditch to fill and dry out* a swampy Louisiana floodplain to farm soybeans); *In re Alameda County Assessor's Parcel*, 672 F.Supp. 1278, 1281 (N.D. Cal. 1987) (*"graders* and a bulldozer" were used "to *spread earthen fill . . . brought onto* the property and *dumped* from *large earthmoving trailer trucks"*); *United States v. Larkins*, 657 F.Supp. 76, 85 (W.D. Ky. 1987) (involving "use of *earthmoving equipment* to *construct earthen dikes and levees* on wetlands"); *U.S. v. Larkins*, 852 F.2d 189, 190 (6th Cir. 1988) on 10-12 acres covered with knee-deep water, *Larkins'* defendants *"dug drainage ditches, cut timber, blasted beaver dams, and began filling low spots."*), emph. added.

[8] It also ignores and contradicts the history of its own regulations and interpretations showing plowing has always been treated as an *exclusion* from the CWA because it is not a "discharge," and that the 1977 statutory *exemptions* were merely intended to *emphatically clarify* this *exclusion*. AFBF Amicus Br. At 10-15. As stated by EPA Administrator Russell Train to the Corps' Chief in 1975: "[T]he primary concern of section 404 is to

The government's position that the farmer exemptions are "not available if the plowing at issue alters the hydrological regime of protected waters[,]" Opp. Br. 13, contradicts the statute's plain language, which requires **two** elements for "recapture": (1) the otherwise exempt "discharge" must be incidental to an activity intended to bring an area into a use to which it was not previously subject, **and** (2) "navigable waters" must be impaired in circulation or reduced in reach. 33 U.S.C. § 1344(f)(2). Plowing is a normal farming activity intended to prepare soil for planting crops, not to render "waters" amenable to previously unavailable "upland" farming. 33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4). By reading the first recapture requirement out of the statute, the government eviscerates the exemptions. Since **all farming** – and **all plowing** – changes the land's hydrology, Pet. App. 19, **there is no farming activity that will not come within the Corps' permitting authority under the government's interpretation.** Such a vast extension of the Corps' powers over traditionally local farming activities is wholly illegitimate given the statutory language and Congressional intent. The cases saying the provision should be construed narrowly merely meant to prevent its extension to activities beyond the expressly enumerated "normal farming activities," not to strike it from the statute entirely. Under the government's view, the farmer exemptions are a mere "grandfather clause" and offer no meaningful protection because they would not apply to any farmer who did anything to change a wetland's hydrology. Pet. 24.[9] This is emphatically *not* what Congress intended. *National Mining, supra,* 145 F.3d at 1405; Pet. 21-27.

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address situations where dredged or fill material is discharged into wetland areas. **By no stretch of the imagination can the simple act of plowing be considered to fall under that category.**" *Id.* at 11, emph. added.

[9] "Wetlands," of course, is not an objective or fixed concept. Lands formerly considered "drylands" or "uplands" when Congress passed the 1977 CWA farmer exemptions may now be classified as "wetlands" due to the ever-changing regulations adopted by Respondents to define their own jurisdiction. CFBF et al., Amicus Br. at 9-10, & fn. 25; AFBF Amicus Br. at 3 ("the wetland evolution for nearly three decades [has] . . . take[n] on a life of its own as it marched relentless up the hill consuming ever-dryer land.").

Petitioners do *not* raise "fact-based challenges" to the conclusion that farming grapes or orchards is a "different" agricultural use than growing forage and ranching cattle. Of course it is. But it is also undisputed that both types of activity are *agricultural* uses, and that the ranchland pastures on Borden Ranch *were always subject to normal farming and plowing in their natural state,* without need of any other, more primary activity designed to convert previously unfarmable wetlands into farmable drylands. In other words, the plowing involved here was *not* merely "incidental" to some other activity or activities actually designed to convert extensive or significant wetlands to drylands, such as occurred in *Deaton, Akers, Avoyelles,* and *Larkins.* Rather, plowing was *the primary activity* occurring at Borden Ranch. The Ninth Circuit majority now grants Respondents legal authority to regulate *this* normal farming activity – plowing – *alone* and *in isolation,* a ruling wholly inconsistent with Congress' intent to provide meaningful farmer exemptions.[10]

4. Regardless of the district court's incorrect reference to an "apparent[ ] agree[ment]," Petitioners *never agreed* each deep plow pass constituted a separate violation. In calculating the penalty, the district court gave no consideration to the number of days on which discharges occurred other than to state the obvious: it would not

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[10] *See, e.g., In re Carsten,* 211 B.R. 719, 732-735 (Bkrtcy. D. Mont. 1997) (recapture provision addresses extensive conversion of unproductive wetlands to drylands on significant scale, not minor conversions of small areas of marginal waters to uplands).

assess multiple daily penalties for each separate plow pass. Pet. App. 102-103. The government ignores that each of the 358 "violations" for which the maximum $25,000 daily penalty was imposed (in the initial "top-down" calculation) was of the *same type*.[11] The Ninth Circuit majority recognized this fact made its penalty holding problematic, Pet. App. 14-15, because the cases it cited imposed multiple penalties for "separate" violations on the same day *only where the violations are in different and distinct categories*. Pet. 28.

The government incorrectly contends *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), *vac. and rem. on other gds.*, 484 U.S. 49, is irrelevant because it discusses a prior version of CWA § 309(d). In fact, *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990) held Congress' 1987 amendment to CWA § 309(d) (33 U.S.C. § 1319(d)), to which Respondents refer, was "intended to ***clarify*** that each ***distinct*** violation is subject to a separate ***daily*** penalty assessment of up to $25,000 . . . ." *Id.* at 1139, add'l emph. added, quoting H.R. Rep. No. 99-1004, 99th Cong., 2d Sess. 132.

The Ninth Circuit majority admitted its approach was not "free from difficulty," but read the "per day" language out of the statute because of supposed "incentive problems." Pet. App. 15. Such an approach is arbitrary. If each plow has multiple shanks, why not assess a separate penalty for each individual furrow created on each pass? And if each furrow pass is a separate daily violation, why not each foot, or each inch thereof? Nor is this arbitrary interpretation of § 1319(d) supported by otherwise "irrational results" or the "policy goal of discouraging pollution." Pet. App. 15. It presupposes a *knowing* violator and

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[11] All violations found here were concededly within the same category. Pet. 29; Pet. App. 15.

fails to apprehend such violators are subject to *substantial additional criminal penalties* under the CWA, including first-time fines up to $50,000 per day and three years imprisonment, see § 1319(c)(2) – clearly significant deterrents to *intentional* conduct.[12] Since § 1319(c)'s criminal penalty provisions allay alleged "incentive" concerns, such concerns cannot support the Ninth Circuit's arbitrary interpretation of § 1319(d)'s *civil* penalty provision.

5. The government's brief contains **irrelevant** and **inaccurate** factual characterizations designed to prejudice this Court and falsely imply this case does not raise significant legal issues. Petitioners briefly address some misstatements, only for the sake of the record. The government refers to Mr. Tsakopoulos' testimony concerning his understanding of Corps guidance given at a single September 1994 meeting *regarding vernal pools*, which the district court found "not veracious." Opp. Br. 4, 5 & n.1, 6 & n.2. The court found CWA violations in only **one** of six vernal pools where the government charged violations, and **that** finding was **reversed by the Ninth Circuit**. Vernal pools are no longer involved in this case at all, Pet. App. 10-11, and Petitioners in no way rely on any such evidence.

The government claims the district court's findings do not support Petitioners' statement that Tsakopoulos tried to plow in accordance with the Corps' guidance to avoid needing a § 404 permit. Opp. Br. 6 & n.2. Yet the district court itself, in a related case, expressly stated of this action: **"Tsakopoulos was found to have made efforts, albeit unsuccessfully, to avoid jurisdictional waters so that he**

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[12] Tsakopoulos' violations were **neither alleged by the government nor found by the district court to be intentional**. Pet. App. 143-144.

could avoid the necessity of obtaining a permit from the government." Pet. App. 144, emph. added.[13]

The transparent purpose of the government's lengthy, inaccurate, and irrelevant recitation of "facts" is to buttress its meritless assertion that the Ninth Circuit's "fact-specific decision does not raise any issue of exceptional importance[.]" Petitioners and their numerous amici disagree, for reasons stated in their briefs. The extreme lengths to which the government has gone to raise and mischaracterize irrelevant facts merely underscores the weakness of its legal position. Respondents' unauthorized conduct, both in litigation and in the CWA regulatory arena, will continue – to the severe detriment of farmers and ranchers nationwide – unless this Court grants certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: May 7, 2002

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[13] The government's reference to testimony of EPA investigators who supposedly saw "fully-engaged rippers at work in jurisdictional wetlands" in April 1997 on Borden Ranch, Opp. Br. 6, is also irrelevant. The district court ***expressly found the cited evidence was insufficient to support any finding of CWA violations*** and thus did not impose civil penalties for any conduct after January 1997. Pet. App. 103-104.

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In the
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BORDEN RANCH PARTNERSHIP;
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does deep plowing of normally dry, seasonally wet ranch land, which involves turning over dirt in place, constitute the addition of a pollutant under Section 404 of the Clean Water Act?

2. Does Section 404 require a permit for deep plowing of normally dry, seasonally wet ranch land, to plant deep-rooted crops, when the Clean Water Act expressly exempts normal farming and ranching activities, such as plowing, from such permit requirements?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, the California Farm Bureau Federation, California Cattlemen's Association, and Pacific Legal Foundation respectfully submit this brief amicus curiae in support of the Petition for a Writ of Certiorari.[1] Written consent for amici curiae participation in this case was granted by counsel of record for all parties.

The California Farm Bureau Federation (CFBF) is a nonprofit, tax-exempt California corporation. Its members are 53 county farm bureaus located throughout California through which it represents owners and operators of farms and ranches, as well as other residents of the state who are interested in the welfare of agriculture. CFBF represents approximately 43,000 California farm families who grow over 250 kinds of crops. Many of these families farm on lands that contain the types of seasonally wet ranch lands at issue in this case. If the Ninth Circuit's decision in this case is not overturned, these families will no longer be allowed to choose what crop they wish to grow if the crop requires deep plowing.[2] Instead they will have to seek approval from the federal government. Not only was this requirement never intended by Congress, but having to seek time delaying approvals is devastatingly incompatible with the day to day needs of normal farming operations.

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae California Farm Bureau Federation, California Cattlemen's Association, and Pacific Legal Foundation affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

[2] Deep plowing occurs where a crop needs irrigation water to penetrate through the soil, but the soil is too highly compacted without the plowing. Deep plowing is often needed to convert land from less-intensive agriculture, such as grazing, to more intensive agriculture, such as orchards, vineyards, alfalfa, and certain vegetable crops. This kind of plowing is done at depths greater than 16 inches and can exceed 4 feet. *See* n.23 *infra*.

California agriculture has a tremendous impact on the lives of individuals throughout the world. If California were a country, it would be the sixth leading agricultural exporter in the world.[3] California is home to eight of the top ten United States farm counties[4] and in every single one of them deep plowing is a long practiced, normal farming activity.[5] California's top four farm exports—almonds, wine, cotton, and table grapes[6]—all require deep plowing prior to planting.[7] Besides producing all of the nation's almonds, California is the nation's sole producer (99% or more) of figs, kiwi fruit, olives,

[3] Department of Water Resources, *California Water Plan Update Bulletin 160-98*, Vol. 1, 1-4 (1998).

[4] United States Department of Agriculture, National Agricultural Service, 1997 Census of Agriculture, AC 97-S-2, *Ranking of States and Counties*, 27, Vol. 2, Subject Series Part 2.

[5] Interview with Hal Collin, President of Agri-Struction (March 15, 2002), a family-owned agricultural land improvement company in business since 1934. Deep plowing allows for better water penetration which in turn allows the roots of the crop to grow deeper. This provides for more stability in tree and vine crops. It also results in better yields, better quality, more efficient use of the water applied to the crop, recharging the ground water, and more efficient utilization of fertilizers and agricultural chemicals that are applied to the crop. *Id.* *See also* University of California Cooperative Extension, *Managing and Modifying Problem Soils* 4-6 (1974).

[6] California Department of Food and Agriculture, *Agricultural Resource Directory 2001* 34 (2001).

[7] *See* University of California, Division of Agricultural Sciences, Leaflet No. 2946, *How to Appraise Soil Physical Factors for Irrigated Vineyards* (1977); University of California Cooperative Extension, *Sample Costs to Establish an Almond Orchard and Produce Almonds* 3 (2001); University of California Cooperative Extension, *California Cotton Review* 5-6 (Sept. 1977).

persimmons, pistachios, prunes, raisins, and walnuts,[8] each of which also often requires deep plowing prior to planting particularly in areas like California's Central Valley that contain clay soils.[9] Nectarines, peaches, plums, oranges, apples, pears, gueros and jalapeno chili peppers, lettuce, all nut crops, loose leaf lettuce, and alfalfa often require deep plowing too.[10]

The California Cattlemen's Association (CCA) is a nonprofit, tax-exempt California corporation. CCA represents the majority of the California cattle industry and nearly 2000 ranching families statewide. California ranchers own over 20% of the private land in this state, and cattle grazing in general occurs on over 37% of the land mass in the state.[11] CCA, like CFBF, is deeply concerned that the Corps of Engineers' exercise of Section 404 permitting jurisdiction over the deep plowing of the usually dry, seasonally wet ranch land at issue in this case, will have severe economic consequences on the

[8] California Department of Food and Agriculture, *Agricultural Resource Directory 2001* 33.

[9] Interview with Hal Collin, President of Agri-Struction (March 15, 2002). *See also* University of California Cooperative Extension , *Sample Costs to Establish a Fig Orchard and Produce Figs* 4 (1994); University of California Cooperative Extension, *Sample Costs to Establish a Manzanillo Olive Orchard and Produce Olives* 4 (1997); University of California Cooperative Extension, *Sample Costs to Establish a Prune Orchard and Produce Prunes* 4 (1997).

[10] *See* University of California Cooperative Extension, *Sample Costs to Establish an Orange Orchard and Produce Oranges* 4 (1999); University of California Cooperative Extension, *Sample Costs to Establish an Apple Orchard and Produce Apples* 3 (1994); University of California Cooperative Extension, *Production Practices and Sample Costs to Produce Loose Leaf Lettuce* 3 (1996); University of California Cooperative Extension, *Sample Costs to Establish a Pecan Orchard and Produce Pecans* 4 (1998).

[11] http://www.calcattlemen.org/aboutcca.htm (last visited April 10, 2002).

state's agricultural industry. Vernal pools[12] and drainage swales[13] are pervasive throughout California's ranch lands. Many CCA members are terrified that their ability to continue to graze and grow crops on their lands, indeed their very right to maintain viable agricultural operations, will be seriously undermined if the common activity of deep plowing in these areas may not go forward without a permit from federal bureaucrats.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Litigating nationwide since 1973, PLF provides a voice in the courts for thousands of Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska. PLF has participated in numerous cases across the country concerning the interpretation of the Clean Water Act and its restrictions on landowners' rights to use their private property in a reasonable, productive manner.

The ranchers and farmers amici represent are faced with ever increasing demands to improve profitability or convert their lands from agriculture to other uses. For instance, between 1964 and 1997, the amount of land used for agriculture in this country dropped about 16% to less than 932 million

[12] Vernal pools are not at issue in this case. *Borden Ranch Partnership v. Army Corps of Engineers*, 261 F.3d 810, 816 (9th Cir. 2001).

[13] Drainage swales are "shallow linear features ranging from several inches to several feet wide, and up to several hundred feet long—which exist and carry stormwater runoff for brief periods only during and after seasonal rains, and which ultimately drain to intermittent streams." Pet. for a Writ of Certiorari at 6.

acres.[14] In California, the most productive agricultural state in the country,[15] agricultural land use dropped by well over 9 million acres during the same period—37 million to 27.7 million acres, a 25% reduction.[16] Between 1988 and 1998 over 420,240 acres in agricultural production were converted to urban and built up uses.[17]

However, the Ninth Circuit's majority decision below ignored the intent of Congress not to impede normal farming activities with the Clean Water Act Section 404 program,[18] but has instead provided additional burdens that will force more and more farm land into nonagricultural uses. For example, if Parkfield, California, rancher and farmer Kevin Kester had been unable to convert 51 acres of his grazing land in 1998 to vineyards, he would have been forced to sell some of his land for nonagricultural uses.[19] The conversion from rangeland to fully planted vineyards enabled Mr. Kester to obtain an

[14] Nicolai V. Kumiroff, Daniel A. Sumner & George Goldman, *The Measure of California Agriculture 2000*, University of California Agricultural Issues Center, November, 2000, at 11.

[15] California Department of Food and Agriculture, *Agricultural Resource Directory 2001* 30.

[16] "Over a quarter of California's landmass is used for agriculture (down from over a third as recently as 1964). Just over half of the 27.7 million acres of agricultural land is pasture and range and about 39% is cropland. Most California farms are small in terms of cash receipts and total sales, and are family or individually operated. California has a greater share of female farm operators and farms with Hispanic, Asian and Pacific Islander backgrounds than the United States as a whole."

Kumiroff, *et al.*, at 7.

[17] Kumiroff, *et al.*, at 16.

[18] *See* n.29, *infra* at 16.

[19] Interview of Kevin Kester (March 12, 2002).

increased cash flow needed to pay estate taxes and avoid the need to sell off part of his property. However, if Mr. Kester had been subject to the Ninth Circuit's *Borden Ranch* decision, he would not have been able to take this action in a timely manner, if at all. It could have taken well over a year just to get the Section 404 permit needed to make the conversion.[20] However, because the *Borden Ranch* decision did not apply to his operation, he was able to act in a timely manner and keep all his acres in agriculture.[21]

This pressure to sell off land is a troubling scenario that is repeating itself time and again. Farmers must retain flexibility in their operations and an ability to make decisions quickly so they can withstand the tremendous economic and societal pressures arrayed against them. Estate taxes, property taxes, market conditions, urban encroachment, changes in water availability, environmental regulation, and a host of tensions work against farming. The Ninth Circuit's decision that the federal government can regulate normal deep plowing under Section 404 was never intended by Congress but is now one more, possibly insurmountable, burden for a number of family farmers in this country.

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[20] One study showed that the average amount of time necessary to obtain a Section 404 permit was 373 days. Bernard Goode & Virginia Albrecht, *Wetland Regulation in the Real World*, ALI-ABA Course of Study Materials, Vol. 1 (February, 1994).

[21] Farms provide significant open space and ecologically valuable habitat for local flora and fauna. Indeed, 75% of the nation's wildlife lives on farms and ranches. California Farm Bureau Federation, *Facts & Stats About California Agriculture* (2002).

STATEMENT OF FACTS

In 1993, Borden Ranch Partnership acquired an 8,400-acre ranch in the Central Valley of California.[22] This land had been used previously for cattle grazing, irrigated pasture, and growing wheat, hay, alfalfa, and row crops. Borden Ranch acquired the land to continue farming it and introduce higher value vineyard and orchard crops. Pet. at 9.

Much of the soils on the ranch were heavily compacted and if not subjected to the common soil preparation practice of deep plowing, would not allow adequate penetration of irrigation water needed for vineyard or orchard crops. Deep plowing loosens and mixes—virtually in place—the compacted soils to a depth of four to six feet. It breaks through the hard soil to allow the percolation of irrigation water.[23]

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[22] The Central Valley has over one half of California's agricultural land. The Valley, with about 64% of California's cropland, recorded 44% of statewide cropland conversion out of agriculture between 1988 and 1998. Valley grazing land, about 44% of state total, contributed 27% of total grazing land conversions. Kumiroff, *et al.*, at 19.

[23] The Corps describes deep plowing, which it calls deep-ripping, as

> the mechanical manipulation of the soil to break up or pierce highly compacted, impermeable or slowly permeable subsurface soil layers, or other similar kinds of restrictive soil layers. These practices are typically used to break up these subsoil layers (e.g., impermeable soil layer, hardpan) as part of the initial preparation of the soil to establish an agricultural or silvicultural operation. Deep-ripping and related activities are also used in established farming operations to break up highly compacted soil. Although deep-ripping and related activities may be required more than once, the activity is typically not an annual practice. Deep-ripping and related activities are undertaken to improve site drainage and facilitate deep root growth, and often occur to depths greater than 16 inches and, in some cases, exceeding 4 feet below the surface . . . .

(continued...)

The Corps objected to Borden Ranch's deep plowing in areas the Corps contends contain waters of the United States (seasonal drainages). The Corps charged that without a permit, the deep plowing in these areas constitutes a discharge of dredged or fill material prohibited by Section 404 of the Clean Water Act. The lower courts agreed with the Corps. (*See* Pet. at 9-15, for a detailed explanation of the facts in this case.)

Whether a Section 404 permit is required for the normal, deep plowing that farmers must do for a variety of crops is an exceptionally important question of law. The Ninth Circuit's answer that it does require a permit is contrary to the plain language and legislative history of the Clean Water Act. The Corps has no jurisdiction under the Clean Water Act to regulate Borden Ranch's plowing, whether it be shallow or deep because Congress never sought to have the federal government control what crops a farmer may plant. However, if left intact, the Ninth Circuit's nonsensical decision will provide that authority and, in the course, seriously hurt farming in California and this nation.

SUMMARY OF ARGUMENT

Section 404 of the Clean Water Act, 33 U.S.C. § 1344, authorizes the Corps[24] to require permits for those activities that "discharge" or "add" a "pollutant" from a "point source" into waters of the United States. Section 404 expressly exempts from this permitting requirement "normal farming and ranching activities, such as plowing," which do not convert an area of water "into a use to which it was not previously subject." 33 U.S.C. § 1344(f). This case involves a question of great

[23] (...continued)
Regulatory Guidance Letter No. 96-02, *Applicability of Exemptions Under Section 404(4) to "Deep Ripping" Activities in Wetlands* (December 12, 1996).

[24] The Environmental Protection Agency (EPA) oversees the Corps' enforcement of Section 404. 33 U.S.C. § 1344(c); 40 C.F.R. pt 231.

importance to the farmers of this country: does the Corps have jurisdiction under Section 404 to prohibit a farmer from the normal farming activity of deep plowing his soil so he can grow the crop of his choice? The Ninth Circuit ruled that the Corps did have jurisdiction over deep plowing and in so doing created not only a conflict among the circuits, but also established a direct contradiction with the express language of the Clean Water Act and Congressional intent.

The Ninth Circuit's finding that the Corps has section 404 jurisdiction over deep plowing is in conflict with *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998). There the District of Columbia Circuit held that incidental fallback of dirt into wetlands during dredging activities is not an addition of a pollutant and therefore is not subject to the Corps' section 404 regulation. Deep plowing, which does not even remove soil from the ground, is at most a type of incidental fallback that adds no more of a pollutant to waters of the United States than the fallback in *National Mining*. Additionally, the Ninth Circuit's finding that the normal farming activity of deep plowing is not exempt from Section 404 regulation contradicts both the Clean Water Act, 33 U.S.C. § 1344(f), and the Corps' own regulations, 33 C.F.R § 323.4(1)(iii)(D). It also conflicts with Congressional history. Each of these sources establishes that the normal activity of plowing was never intended to be subject to section 404 regulation. Nevertheless, through an expansive regulatory interpretation of its authority, the Corps has taken the position that it can stop a farmer from turning over even a shovel full of dirt on his usually dry ranch land.[25]

[25] One scholarly article evaluated the continuing expansion of the Corps' jurisdiction and described it as "broadened by liberal interpretation of wetlands physiology." It cited with approval Judge Merrit from the Sixth Circuit who stated in *United States v. Larkins*, 852 F.2d 189, 193-94 (6th Cir. 1988) (Merrit, C.J. concurring) that "the Corps has now expanded the (continued...)

This Court should grant the Petition for a Writ of Certiorari to eliminate this conflict between circuits and to rein in the Corps' unauthorized exercise of section 404 jurisdiction. Otherwise, the future of family farming in this country will be bleak indeed.

ARGUMENT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE CONFLICT AND CONFUSION AMONG THE CIRCUITS

A critical question in this case is whether deep plowing normally dry, seasonally wet ranch land **adds** a pollutant to waters of the United States. Without such a finding, the Corps has no Section 404 permitting jurisdiction over Borden Ranch and other similar farm operations. This Court has provided no definitive answer to this question while the circuits show no consistency in confronting the issue.[26] We are left only with a circuit conflict which needs to be resolved.

For plowing to be controlled by Section 404, it must involve the "discharge of dredged or fill material into the

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[25] (...continued)
definition of 'navigable waters' to include any creek or stream or moist area . . . . A farmer's low-lying farmland or a homeowner's low-lying backyard—adjacent to a small stream or creek, but many miles from a navigable waterway—has apparently been converted into government property no longer subject to control or improvement by the owner without government permission." Bianucci & Goodenow, *The Impact of Section 404 of the Clean Water Act on Agricultural Land Use*, 10 UCLA J. Envtl. L. & Pol'y 41 (1991).

[26] "The effect of the *National Mining* decision [no Section 404 jurisdiction over incidental fallback] on holdings in other courts has been ambiguous." Morrison, Administrative Law; Clean Water Act: *National Mining Association v. Army Corps of Engineers*, 27 Ecology Law Quarterly 649, 663-4 (2000).

navigable waters[27] at specified disposal sites." 33 U.S.C. § 1344(a). This is a specific requirement derived from Section 301(a) of the Act which prohibits the "discharge of any pollutant" unless in compliance with the permit (e.g., Section 404) requirements of the Act. 33 U.S.C. § 1311(a). The term "pollutant" includes "dredged spoil, . . . rock, sand, cellar dirt . . . and agricultural waste discharged into water," 33 U.S.C. § 1362(6), and has been interpreted by the courts to include soil. *United States v. Wilson*, 133 F.3d 251, 259 (4th Cir. 1997), *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983). Thus, soil is a pollutant and can be

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[27] The Clean Water Act defines navigable waters only as "the waters of the United States, including the territorial seas," § 1362(7). This Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)* 531 U.S. 159 (2001), addressed whether the Corps' definition of "waters of the United States" in 33 C.F.R. § 323.2(a)(5) (1978), was what Congress intended. This Court found that the regulation read the term "navigable" out of the definition by expanding "waters of the United States" to include "isolated wetlands" and later, "intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters of the United States, the degradation of which could affect interstate commerce." 33 C.F.R. § 323.2(a)(5). This Court earlier found Section 404 jurisdiction over nonnavigable wetlands located *directly adjacent* to open waters, *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985), but in *SWANCC* the Court refused to expand jurisdiction per the Corps' regulation to "isolated wetlands" not adjacent to open water bodies. To do so would make a nullity of the word "navigable" as used in the Clean Water Act. *SWANCC*, 531 U.S. at 172.

While this Court did not address jurisdiction over the types of "wetlands" now involved in this case, Amici strongly believe that this Court's reasoning in *SWANCC* should also bring into question the Corps' Section 404 jurisdiction over the "widely dispersed seasonal drainage swales and intermittant drainages" on the "semi-arid Borden Ranch." Pet. at 6. This Court recognized that Congress may have intended Section 404 to cover only "waters adjacent to 'navigable waters,' such as nonnavigable tributaries and streams." *SWANCC*, 531 U.S. at 171. Borden Ranch did not enter any tributaries or streams but confined its plowing to less than a collective 2 acres of normally dry areas where rainwater collected or flowed downhill. Thus, Amici believe the plowing in this case did not involve any jurisdictional waters of the United States.

"dredged or fill material" subject to Section 404. However, for "plowing" to be controlled by Section 404, it must also involve the "discharge" of dredged or fill material.

The Act defines the "discharge of a pollutant" as "any **addition** of any pollutant [or pollutants] to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). Accordingly, the terms "addition" and "point source" also must be satisfied for plowing to come under Section 404 control. Unfortunately, the Act does not define the term "addition," although it does define "point source" as any discernable, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.[28] 33 U.S.C. § 1362(14).

The Corps concluded that Borden Ranch's plowing is subject to Section 404 control because it causes the *addition* of a *pollutant* (dirt) from a *point source* (plow) *into navigable waters* (normally dry, seasonally wet ranch land) at *specified disposal sites* (the plowed ranch land). The Ninth Circuit agreed, ruling that the plowing here constitutes an "addition" of a pollutant. *Borden Ranch*, 261 F.3d at 814. But this finding and the court's reasoning *conflict* with the District of Columbia

[28] Amici agree with Petitioners that a plow has never been characterized before as a "point source" (Pet. at 20) and by doing so the lower court has put the nation's farmers in a tenuous situation. When they plow a wet area, must they first obtain permission from the Corps? Amici agree with petitioners that the majority decision below improperly analogizes the plows used by Borden Ranch to the bulldozers and backhoes previously found to constitute point sources. In those latter instances, that machinery was used for clearing the land by significant soil movement, leveling, and filling sloughs and cutting brush and vegetation at ground level. *See Avoyelles*, 715 F.2d at 923. However, that machinery was not used just to turn over and break up soil as was the machinery in this case. Thus, the lower court's likening of the machinery used to remove, redistribute, and pile dirt in wetlands to machinery used only to mix and loosen the soil in place is faulty.

Circuit's decision in *National Mining Association*, 145 F.3d 1399. In that case, the Corps sought to regulate under Section 404 the removal of soil from a wetland area where, during removal, some of the dirt would fall back onto the wetland. The court found that

> the straightforward statutory term "additions" cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge.

Id. at 1404. Of course, **plowing** also is not an act of discharge or adding pollutants to a wetland. It is an act of "breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops." 33 C.F.R. § 323.4(1)(iii)(D); 40 C.F.R. § 232.3(d)(4). All plowing involves nothing more than the "incidental fall back" of soil that is being broken up and turned over. It "adds" nothing to the land.

However, rather than recognize *National Mining Association* as controlling, the court instead found Borden Ranch was governed by two completely inapposite cases, one in the Ninth and one in the Fourth Circuit. *See Borden Ranch*, 261 F.3d at 814. In those cases, soils had been removed by buckets from waters and wetlands and then later redeposited into those areas. In *Rybachek v. United States Environmental Protection Agency*, 904 F.2d 1276 (9th Cir. 1990), a placer miner excavated dirt and gravel from a stream bed to an out of stream location, sifted out the gold, and later disposed of the leftover waste material by redepositing it back into the stream. This is not comparable to the instant situation. Borden Ranch did not remove the soil, change its character, and redeposit the spoils. To the contrary, Borden Ranch simply turned the dirt over in place. Borden Ranch added no pollutant by its deep

plowing. As Judge Gould explained in his dissent in this case, deep plowing "does not involve any significant removal or 'addition' of material to a site." *Borden Ranch*, 261 F.3d at 820. Moreover, "[b]ecause deep [plowing] does not move any material to a substantially different geographic location and does not process such material for any period of time, *Rybacheck* is not controlling." *Id.*

The second case relied on by the majority, *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), is no more persuasive. In that case, a landowner excavated a drainage ditch in wetlands and sidecast the dredged material onto the wetlands bank alongside the ditch. The court adopted the position that once material is removed from a wetland it becomes a pollutant, and its redeposit becomes an addition of a pollutant subject to Section 404. *Id.* at 335-36. Under this creative reasoning, the majority in this case found deep plowing was analogous to *Deaton*'s sidecasting although there was no removal and redepositing of the dirt. *Borden Ranch*, 261 F.3d at 814. In contrast, dissenting Judge Gould once again found *National Mining Association* more persuasive stating, "[a] farmer who plows deeply is not, in my view, redepositing dredged or excavated materials." *Id.* at 820.

Thus, the reasoning of the Ninth Circuit majority in this case squarely conflicts with the reasoning of the D.C. Circuit in *National Mining Association.* This underscores a clear conflict as to which circuit's decision controls "deep plowing." This Court should grant certiorari to clear up this conflict. Does deep plowing on normally dry, seasonally wet ranch land **add** a pollutant to the nation's waters subjecting it to Section 404 regulation? Amici emphatically believe it does not, but without Supreme Court intervention regulation of this common agricultural practice will continue as a serious detriment to farmers nationwide.

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO ADDRESS THE IMPORTANT QUESTION OF WHETHER PLOWING RANCH LAND IS EXPRESSLY EXEMPT FROM SECTION 404 REGULATION

The Ninth Circuit's determination that the Corps has Section 404 permitting jurisdiction over Borden Ranch's seasonally wet ranch land raises another serious question that needs to be resolved. Is plowing such land that has a history of uninterrupted agricultural use exempt from Section 404 regulation where the purpose of the plowing is to plant a new crop that needs better percolating soil? As shown earlier, *supra* at 2-5, ranchers and farmers regularly convert from one crop to another as part of normal farming operations. Economic exigencies often call for it. Congress knew this and wanted to make sure such management decisions were not encumbered by Section 404. In fact, because Congress "emphatically did not want the law to impede these bucolic pursuits," *National Mining Association*, 145 F.3d at 1405, Congress passed amendments to the Clean Water Act in 1977 adding specific exemptions for farming activities.[29]

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[29] Congressman Roberts explained that due to the regulatory expansion of the Section 404 program since its 1972 inception, the bill "excluded from regulation normal ranching activities." *A Legislative History of the Clean Water Act of 1977*, Vol. 3 (1978); House debate, December 17, 1977, *Report on Resolution Providing For Consideration of Conference Report on HR 3199*, Clean Water Act of 1977 at 351 (hereinafter Clean Water Act Legislative History). Congressman Hammerschmidt further clarified that

> we will now have for the first time statutory recognition that normal farming, ranching and silviculture activities do not belong in this permit program. These exemptions reemphasize that Congress never intended these activities to be considered discharges of dredged or fill material. *Id.* at 349.

Congressman Stump explained that "[t]he conferees have clarified that plowing . . . [was] not intended to require Section 404 permits." *Id.* at 420.

(continued...)

Section 404 was amended to allow, without a permit, any discharge from normal farming, silviculture, and ranching activities such as **plowing**, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. 33 U.S.C. § 1344(f)(1)(A). This subsection does not limit itself to certain types of plowing but the Corps unilaterally decided in 1996, without formal rulemaking, that the deep plowing needed to prepare compacted soil for vineyards or orchards does not constitute a "normal farming" activity. (*See* Petitioner's Appendix 4, 199-207; RGL 96-02.) This new interpretation conflicts with the government's own regulations which recognize that plowing is not a Section 404 regulated activity and, hence, is a normal farming activity. *See* 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.3(c)(1)(i). When defining what the term "discharge of fill material" means, the Corps of Engineers categorically states that "the term does not include plowing." 33 C.F.R. § 323.2(e). EPA's regulatory definition for plowing, 40 C.F.R. § 232.3(D)(4), expresses the same conclusion:

> Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up,

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[29] (...continued)
Later in debate, conferee Senator Stafford further clarified the conference report explaining that

> the bill includes the clarification that permits are not required for certain normal farming activities such as plowing and seeding which are not discharges of dredged or fill material.

Id. at 485. He also explained that other farming activity that would "connect water to dry land including, for example, those occasional farm or forestry activities that involve dikes, levees or other fills in wetland or other waters," *activities unlike plowing*, would still require a permit. *Id.* And last, Senator Baker made it quite clear in debate that "activities . . . such as plowing . . . do not involve point source discharge of dredged or fill material." *Id.* at 524.

> cutting, turning over, or stirring of soil to prepare it for the planting of crops . . . . Plowing, as described above, will never involve a discharge of dredged or fill material.

Thus, all plowing, including deep plowing, must be a normal farming activity within the meaning of Section 404(f)(1)(A), or it *would not* be expressly excluded from the meaning of "discharge of dredged or fill material" by the Corps' and EPA's own regulations.

However, the court below found otherwise and also ruled that even if the deep plowing were exempt, Subsection (f)(2) provides an exception to the farming exemptions applied to Borden Ranch. *Borden Ranch*, 261 F.3d at 815. Subsection (f)(2) is known as the recapture provision. It states:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.[30]

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[30] Once again, the application of Section 404 is limited by its express terms to "navigable waters." Under *SWANCC*, waters of the United States subject to Section 404 jurisdiction include wetlands adjacent to traditional navigable waters, possibly including adjacent nonnavigable tributaries and streams. 531 U.S. at 172. However, it is undisputed that Borden Ranch did not conduct plowing activities in wetlands adjacent to either traditional navigable waters or nonnavigable tributaries or streams. As expressed by the Fifth Circuit Court of Appeals in *Rice v. Harken Exploration Co.*, 250 F.3d 264, 271 (5th Cir. 2001), "it would be an unwarranted expansion of [the Clean Water Act] to find that discharges onto land that only infrequently carried running water were discharges into navigable waters." *See also United States v. Newdunn Associates*, Civ. No. 2:01cv508 (E.D. Va. Opinion and Order, April 3, 2002) (no Section 404 jurisdiction over surface

(continued...)

33 U.S.C. § 1344(f)(2) (footnote added).

The Ninth Circuit interpreted this subsection to negate the subsection (f)(1) plowing exemption if a farmer is changing his crop, for example, from seasonal hay or pasture grass to orchards or vineyards and the plowing causes "substantial hydrological alterations." *Borden Ranch*, 261 F.3d at 815-16 (citing *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986)). But the *Akers* decision never held that plowing solely done for the purpose of changing crops constituted "bringing an area [of the farm] into a use to which it was not previously subject." On the contrary, *Akers* dealt with converting a nonfarmable part of the farm known as the Big Swamp to uplands by massive dyke building, grading, leveling, and water diversion activities. *Akers*, 785 F.2d at 816. Borden Ranch's plowing activities were of a completely different nature, but nevertheless were treated by the Ninth Circuit as identical to *Akers*.

The court took the position, in essence, that under Section 404 it is not the farmer but the Corps that has the role of determining what crops may or may not be produced by the farmer. Under this interpretation, the government would control through the Section 404 permitting process all plowing on land with any type of seasonal, normally dry wetland area. If this is so, the 1977 farming exemptions are virtually meaningless. The Corps will have become the managing general partner of vast acreages of private farmland across the nation. But Congress never intended such agency authority. As this Court recognized in *SWANCC*, in addressing the jurisdictional scope of the Section 404 program, "[r]ather than

---

[30] (...continued)
water that drains into a series of ditches that drain into navigable water body); *United States v. Rapanos*, 2002 U.S. Dist. LEXIS 3957 (E.D. Mich. S.D. February 21, 2002) (no Section 404 jurisdiction over wetlands draining into nonnavigable creeks that drain into navigable water body over 20 miles away).

expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve and protect the primary responsibilities and rights of states . . . to plan the development and use . . . of land and water resources' . . . 33 U.S.C. § 1251(b)." *SWANCC*, 531 U.S. at 174. The Ninth Circuit ignored this principle.

The Ninth Circuit's interpretation of the Section 404(f) exemption eliminates virtually any practical application of the exemption for farmers. This interpretation that includes plowing as a Section 404 regulated activity threatens the viability and independence of this nation's family farmers. This is an issue of great importance the Court should review.

CONCLUSION

Amici urge the Court to grant the Petition for a Writ of Certiorari.

DATED: April, 2002.

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No. 01-1243

In The

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP; ANGELO K. TSAKOPOULOS,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as amicus curiae in support of the petitioners. The letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 205,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Many of NAHB's members own and develop land. Therefore, it is concerned with any judicial decision that affects the activities that a landowner may conduct on its own property.

The central issue in this case concerns the spectrum of activities that require federal approval from the Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") through the permitting programs of the Clean Water Act ("CWA"). These are some of the most common permits that NAHB's members must obtain in their projects to provide housing for the Nation's citizens. *Amicus* submits that the agencies often compel our members to apply for CWA permits beyond the scope of Congressional authority. To curb this abuse of authority, since 1991 NAHB has participated in numerous lawsuits—

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[1]Pursuant to Rule 37.6 of this Court, amicus state that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

both as a named party and as an *amicus*—to police the CWA's permitting programs and ensure that the agencies are not extending their authority in an unauthorized manner.

INTRODUCTION

The Court recently affirmed that federal regulatory authority under the CWA has limits. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001) (*"SWANCC"*), the Court ruled that the CWA only reaches waters with a connection to "navigability" and that the statute cannot be stretched to encompass isolated, intrastate waters. While *SWANCC* addressed the *geographic* extent of CWA jurisdiction, the petition before the Court addresses the types of *actions* that Congress intended to regulate.

As discussed below, the CWA requires permits for "discharges" of pollutants into navigable waters. *See* 33 U.S.C. §§ 1342, 1344. The statute defines "discharge" to be an "addition." *Id.* at § 1362(12). Thus, the courts have held that an addition of material is required to trigger statutory coverage under section 404, but that other activities which remove material are not covered by that section. *National Mining Ass'n v. U. S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998); *Save Our Community v. U.S.E.P.A.*, 971 F.2d 1155, 1162 (5th Cir. 1992); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 922-25 (5th Cir. 1983).

The Ninth Circuit's decision, however, ignores that statutory language and caselaw. Offended by petitioner's "deep ripping," a form of plowing used to prepare soil for the deep roots of orchards and vineyards, the Ninth Circuit

held that "activities that destroy the ecology of a wetland are not immune from [CWA] jurisdiction merely because they do not involve the introduction of material brought in from somewhere else . . . [petitioner's activity] constitutes environmental damage sufficient to constitute a regulable redeposit." *Borden Ranch Partnership v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 814, 815, and n.2 (9th Cir. 2001). Yet Congress did not intend to regulate any activity that impacts a wetland; only a statutory "discharge" will suffice. By concluding that jurisdiction is triggered by "damage" rather than a "discharge," the Ninth Circuit has reinterpreted the CWA to regulate more activities than Congress and other federal circuit decisions allow.

Based on the agencies' past response to judicial decisions, NAHB submits that the Corps and EPA will attempt to use the Ninth Circuit's opinion to justify federal regulation over a vast spectrum of soil movements (not just plowing) in all CWA jurisdictional waters. Indeed, a joint Corps/EPA regulation issued in January 2001 currently (and illegally) "regards" that any "earth-moving activity" caused by a machine results in a statutory "discharge" and thus requires a section 404 permit. *See* 66 Fed. Reg. 4550, 4575 (2001) (codified at 33 C.F.R. § 323.2 (2001)).

The Corps' and EPA's excessive assertions of jurisdiction, including those underlying the *Borden Ranch* decision and embodied in the January 17, 2001 regulation, will continue until checked by this Court. The petition should therefore be granted.

REASONS FOR GRANTING THE PETITION

I. SUPREME COURT REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT REINTERPRETED THE CLEAN WATER ACT TO REGULATE MORE ACTIVITIES THAN CONGRESS AND OTHER FEDERAL CIRCUIT DECISIONS ALLOW.

CWA Section 301(a) prohibits the "discharge of any pollutant" *except* as authorized by other sections of the statute. 33 U.S.C. § 1311(a). Section 404 is one such exception. It authorizes the Corps to issue permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344. Section 402 is another exception to the discharge prohibition. It allows EPA and delegated states to issue permits for discharges of other pollutants, such as industrial and municipal waste. 33 U.S.C. §§ 1342, 1362(6).

The CWA makes plain that the existence of a "discharge" is the critical, deciding factor in determining its reach. The statute, in turn, defines "discharge" to require an "addition" of a pollutant. *Id.* at § 1362(12). This is the crucial point: Congress only intended to regulate activities that *add* pollutants to navigable waters. Other actions like plowing, excavating, or draining may adversely affect wetlands by moving soil and vegetation but they are beyond the CWA's scope unless material is *added.* Conversely, a discharge that adds material is regulated even where no damaging effects occur.

The Ninth Circuit, however, failed to follow the plain requirements of the CWA. It has allowed the agencies to assume jurisdiction over an activity based on its environmental effects, even when there is no addition of dredged material.

A. Prior Court Decisions Make Clear That CWA Jurisdiction Is Triggered By Discharges, Not Effects.

1. Section 404 Cases

The Ninth Circuit's opinion virtually ignores the decision of the D.C. Circuit in *National Mining,* where the court ruled:

> [T]he straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition of material, it cannot be a discharge . . .. In fact the removal of material *from* the waters of the United States, as opposed to the discharge of material *into* those waters, is governed by a completely independent statutory scheme. . . . [T]he [Rivers and Harbors Act of 1899] covers the act of dredging, while [CWA] Section 404 [] covers the disposal of the dredged material.

145 F.3d at 1404 (emphasis added) (citations omitted). The agencies argued that soil material becomes a pollutant

once it is excavated and that the soil material that inevitably falls off a shovel during such excavation is therefore a discharge of a pollutant. But the D.C. Circuit held that there can be no "addition" of a pollutant without an addition of material. *Id.*

The Fifth Circuit has likewise decided that a discharge into navigable water, not the environmental effect of an activity, is the jurisdictional prerequisite for regulation under Section 404. In *Save Our Community*, a landfill operator proposed to drain several man-made ponds within the site to make them suitable for landfill use. The Corps and EPA agreed that the operator's draining activities were not regulated because they did not result in an addition of dredged or fill material. The district court held that the proposed activity would destroy wetlands and therefore required a permit, but the Fifth Circuit reversed, holding that "absent a finding of discharge, draining activity that converts a wetland does not trigger section 404 jurisdiction." *Save Our Community*, 971 F.2d at 1165-66. The court observed that "the federal government has not taken upon itself to resolve all environmental issues which arise in the United States." *Id.* at 1164; *see also National Mining*, 145 F.3d at 1410 (if the agencies believe that the CWA inadequately protects wetlands because the statute insists upon an "addition" to trigger jurisdiction, "the appropriate body to turn to is Congress.").[2]

[2]In his dissent below, Judge Gould understood that only discharges adding pollutants could trigger Section 404 permitting requirements, not a test based on an activity's degrading effects to a wetland. He remarked that, as a result of deep-plowing, "the hydrological regime is modified, but Congress spoke in terms of discharge or addition of pollutants, not in terms of change of the hydrological nature of the soil. If Congress intends to prohibit so natural a farm activity as plowing, and even the deep plowing that occurred here, Congress can and should be explicit." *Borden Ranch Partnership v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 820 (9th Cir. 2001) (Gould, J., dissenting).

And the Eighth Circuit, addressing the same issue from the other end of the rule, has also held that a discharge, not effects, is the deciding factor in triggering CWA jurisdiction. In *Minnehaha Creek Watershed Dist. v. Hoffman*, the lower court held that the construction of dams and placement of riprap into lake waters did not constitute a discharge because there was no evidence that the activities would have detrimental effects. But the Eighth Circuit held that, if a discharge occurs, it will still be regulated regardless of whether the activity involves a "significant alteration in water quality." 597 F.2d 617, 626-27 (8th Cir. 1979).

2. Section 402 Cases

Decisions interpreting CWA section 402 have adopted the same analysis. Thus, dams that cause water quality changes in navigable water without adding pollutants do not require a section 402 permit. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). Likewise, the Sixth Circuit has held that a Section 402 permit is required only where there is an addition of a pollutant from a point source, not where a dam "merely transmit[s] the water coming into it, in whatever altered form." *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988).

In summary, the decisions interpreting sections 402 and 404 make clear that the CWA's prohibitions are triggered by discharges, not effects. The Ninth Circuit's decision below, which premises CWA jurisdiction on

effects, not discharges, represents a break with consistent caselaw and creates a split in the circuits that warrants this Court's review.

B. CWA Jurisdiction Is Triggered By Discharges *Into* Navigable Water of Material Dredged *From* Such Water.

1. The Ninth Circuit Was Wrong About *Rybachek* and *Deaton*.

The Ninth Circuit relied on two prior decisions to find that petitioner's deep ripping qualified as a "discharge." Both of the prior decisions, however, addressed material that was first "dredged" or "excavated" *from* water, then subsequently discharged *into* navigable water. *Rybachek v. U.S.E.P.A.*, 904 F.2d 1276, 1285 (9th Cir. 1990) (where streambed is excavated, then processed to extract gold, subsequent discharge of sifted material into navigable water is regulable); *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000) ("the contractor removed earth and vegetable material *from* the wetland… once that material was *excavated from* the wetland, its redeposit in that same wetland added a pollutant…") (emphasis added).

In clear contrast to *Rybachek* and *Deaton*, petitioner moved material in waters but did not dredge material *from* a water and subsequently "discharge" it "*into*" a navigable water. The D.C. Circuit recognized this distinction in *National Mining*. 145 F.3d at 1406 ("*Rybachek* would help the agencies if [it held that fallback during placer mining constituted a discharge], but instead it identified the regulable discharge as the discrete act of dumping leftover material into the stream *after* it had been processed.") (emphasis added). The Ninth Circuit, however, simply excised the jurisdictional trigger of a "discharge of dredged or fill material *into* the navigable waters" and rewrote Section 404 to regulate soil movements that cause "damage." 33 U.S.C. § 1344 (emphasis added).

2. Section 404 Does Not Apply To Soil Movements *Per Se*, Absent A Discharge.

Whether petitioner's actions triggered federal jurisdiction turns on whether "dredged or fill material" was discharged. "Fill material" is material "used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. § 323.2(e). The regulatory definition of "discharge of fill material" specifically excludes

> plowing, cultivating, seeding and harvesting for the production of food, fiber and forest products.

Id. at § 323.2(f). Thus, petitioner's activities cannot be a discharge of fill material because (1) they were not conducted for the primary purpose of changing the bottom elevation or creating dry land, and (2) they do involve plowing for the production of food products.

Nor can they be a "discharge of dredged material." "Dredged material" is "material that is excavated or dredged from waters of the United States." *Id.* at § 323.2(c). Material must actually be dredged to be "dredged material." The term "dredged" is not defined in the CWA, and Corps regulations simply define "dredged material" as "material that is excavated or dredged from

waters of the United States." 33 C.F.R. § 323.2(c). The ordinary meaning of "dredge" is

> *v.* **1** *tr.* **a** (often foll. by *up*) bring up (lost or hidden material) as if with a dredge (*don't dredge all that up again*). **b** (often foll. by *away*, *up*, *out*) bring up or clear (mud, etc.) from a river, harbor, etc. with a dredge. **2** *tr.* clean (a harbor, river, etc.) with a dredge…

Oxford American Dictionary, 291 (Oxford University Press 1999). Thus, the term "dredge" essentially means to bring material up and clear it away from a waterbody (to allow, for example, the transit of boats engaged in interstate commerce). It follows that "dredged material" is material that is actually dredged from a waterbody, not soil that is merely churned but not "dredged from" the area. Indeed, as the Corps' regulations recognize, "dredged material" is material that has been "dredged *from* waters." 33 C.F.R. § 323.2(c) (emphasis added).[3]

Taken together, these points demonstrate that, under the plain language of CWA Section 404, federal jurisdiction over discharges of dredged material is triggered only if (1) material (2) that has been dredged (3) is added (4) to navigable water. Activities in navigable waters that may cause "environmental damage" or

[3]Dredging itself is not regulated by Section 404, but rather by the Rivers and Harbors Act of 1899. Section 404 regulates the discharge of material that has been dredged. *See* 33 U.S.C. § 403 and *National Mining*, 145 F.3d at 1404 (the Rivers and Harbors Act covers the act of dredging, while the CWA covers the disposal of the dredged material).

"redeposits" simply are not regulable discharges of dredged material unless these elements are met.

By reinterpreting Section 404 to regulate movement of soil that causes damage rather than "additions," the Ninth Circuit's decision exceeds the CWA's jurisdictional framework and creates a conflict between the federal circuits.

II. SUPREME COURT REVIEW IS NECESSARY TO CORRECT THE AGENCIES' ABUSES OF THE TERM "DISCHARGE" AND TO CONFIRM THAT THE CWA ONLY REACHES ACTIVITIES THAT *ADD* MATERIALS.

Since 1991 the Corps and EPA have issued three separate regulations and innumerable bits of "guidance," all in an effort to define "discharge of dredged material." In so doing, the agencies have alchemized "discharge" to cover sweeping categories of activities that cannot remotely be construed to "add" anything to jurisdictional waters. Even if the subject activity *removes* or *excavates* material, the Corps and EPA would nonetheless require a section 404 permit through its regulations.

The timeline below lays bare the agencies' extra-jurisdictional attempts to regulate based on environmental effects. It chronicles the "pull" of the courts to narrow the definitional term "discharge" and the agencies' reactive, expansive "push" to cover virtually any action that subtracts soil from, or moves soil around in, a navigable water. Such regulatory overreach will continue unabated unless the Court reigns in the agencies and reviews the Ninth Circuit's decision.

A. 1977-1991: Early Regulations Were Faithful To The CWA.

During the first 18 years that the Corps and EPA enforced the CWA, they faithfully interpreted Section 404 in a manner confirming that "discharge" required an addition of materials. In 1977, the Corps promulgated final regulations defining the term "discharge of dredged material" as "any addition of dredged material into waters of the United States." 42 Fed. Reg. 37,122, 37,145 (1977). Guidance issued in 1981 and reissued in 1984 reinforced the understanding that additions were regulated, but removals and other soil movements were not:

> [Section 404] does not authorize the Corps to regulate dredging in [waters of the United States] . . .. *De minimus* discharge occurring during normal dredging operations, such as the drippings from a dragline bucket, is not considered to be a Section 404 discharge.[4]

In 1986 the Agencies issued revised Section 404 regulations that remained consistent with the idea that activities involving incidental soil movement were not regulated. *See* 33 C.F.R. § 323.2(d) (1992) (Corps regulations); 40 C.F.R. § 232.2(e) (1992) (EPA regulations). In the preamble to its 1986 regulations, the Corps plainly acknowledged: "We have consistently provided guidance to our field offices since 1977 that

[4]U.S. Army Corps of Engineers, Regulatory Guidance Letter 81-4: Application of Section 404 to Dredging Projects ¶¶ 1-2 (June 3, 1981); U.S. Army Corps of Engineers, Regulatory Guidance Letter 84-4: Application of Section 404 to Dredging Projects ¶¶ 2-3 (Mar. 23, 1984) (reissuance of RGL 81-4).

incidental fallback is not an activity regulated under section 404." 51 Fed. Reg. 41,206, 41,210 (1986).

B. 1991: Tulloch 1 Rule Regulates "Incidental Fallback."

The regulatory landscape shifted in 1991, when environmental groups sued the agencies and two landowners, alleging that the landowners' clearing and excavation activities destroyed and degraded wetlands and therefore should be subject to Section 404 regulation. *North Carolina Wildlife Fed'n v. Tulloch,* No. C90-713-CIV-5-BO (E.D.N.C. 1992). Rather than defend the lawsuit, the Corps and EPA settled by agreeing to amend their rules to regulate landclearing and excavation. On August 25, 1993, the agencies adopted a final rule—commonly known as the Tulloch Rule (hereafter, "Tulloch 1")—that was virtually identical to the language dictated by the parties' settlement agreement. *See* 58 Fed. Reg. 45,008 (1993).

Tulloch 1 purported to extend the agencies' authority to a new category of activity known as "incidental fallback": "any redeposit of dredged material . . . which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 58 Fed. Reg. at 45,035, 45,037. Because it is "virtually impossible" to excavate or clear land without causing some incidental soil movement (*see id.* at 45,017), and because such incidental soil movement was now considered a "discharge," *for the first time since the CWA's inception,* Tulloch 1 required a Section 404 permit for all actions that removed soils from, or pushed soils in, jurisdictional waters. The agencies acknowledged that their decision to now regulate activities causing only

incidental fallback was not driven by concern about the incidental soil movement itself, but rather by concern about adverse effects resulting from disturbance of soils in waters of the United States. *See* 58 Fed. Reg. at 45,019. Characterizing incidental soil movement as a "discharge" thus provided the pretext for regulating removal, ditching, plowing, and other soil-moving activities that the agencies had no authority to regulate directly under the Act.

C. 1997-1998: Federal Courts in the D.C. Circuit Strike Tulloch 1 as Facially Invalid, Because the Rule Regulated Activities that Did Not Add Materials.

In 1993, *Amicus* NAHB and other trade groups challenged Tulloch 1 as exceeding the Corps' and EPA's authority. The U.S. District Court for the District of Columbia agreed with NAHB. Recognizing that Section 404 only regulates "discharges" (and not removal or soil disturbance *per se*), the district court found Tulloch 1 "inconsistent with the language and intent of the [CWA]." *American Mining Congress v. U.S. Army Corps of Eng'rs,* 951 F.Supp. 267, 270 (D.D.C. 1997). "[Congressional] understanding of 'discharge' excludes the small-volume incidental discharge that accompanies excavation and landclearing activities." *Id.* at 273. Accordingly, the district court "declared [Tulloch 1] invalid" and entered a permanent injunction ordering the agencies "not to appl[y] or enforc[e]" the rule. *Id.* at 278.

The U.S. Court of Appeals for the D.C. Circuit affirmed without a dissent in *National Mining*. The appeals court examined the administrative record and concluded that Tulloch 1 stretched federal authority to reach, among other things, the "soils and sediments [that]

fall from the bucket" during excavation operations, and the "scrap[ing] or displac[ement of] wetland soil" during mechanized landclearing." 145 F.3d at 1403 (citing Tulloch 1 preamble, 58 Fed. Reg. at 45,017-018). However, such an extension of authority flouted Congress's definition of "discharge" because it did not require some "addition" of material. *Id.* at 1404. Simply, "how [can there] be an addition of dredged material when there is no addition of material"? *Id.*

D. 1997-1999: Corps and EPA Efforts to Circumvent the *AMC* and *NMA* Opinions and Regulate Excavation and Other Soil Movements *Per Se*.

The Corps and EPA responded with a campaign of resistance to *AMC* and *National Mining*. An EPA official derided these decisions as creating a "loophole" in the statute. Memorandum from J. Charles Fox, Assistant Administrator for Water, to The Administrator, "Impacts to Public Health and the Environment Associated with the 'Tulloch' Decision—ACTION MEMORANDUM" (June 1, 1999). The Corps also issued a document styled as "'Interim, Interim' Information Regarding the 'Excavation Rule' Decision, American Mining Congress v. Corps" (February 13, 1997)). The "Interim, Interim Information" instructed Corps field officials that they could properly assert jurisdiction over incidental fallback, notwithstanding the result in *AMC*, by bootstrapping authority over some other part of a larger project where a regulable addition of material had in fact occurred. The "Interim, Interim Information" directed that "many projects that could be built with only 'incidental fallback, . . . also need Corps authorization for access roads or other parts of the project . . . [T]he excavation [*i.e.,* non-regulated] part of the project

can be treated as secondary impacts of the parts of the overall project that we do regulate."

Next came "Tulloch 2," an "interim" rule published on May 10, 1999, pending a formal rulemaking to comply with *National Mining*. *See* 64 Fed. Reg. 25,120 (1999). Although styled as an attempt to comply with the *AMC* and *National Mining* decisions, Tulloch 2 was nothing more than a resuscitation of the rejected Tulloch 1 rule. Based on the plain text of Tulloch 2,[5] the agencies continued to unlawfully regulate soil ("excavated material") necessarily displaced as an "incidental" byproduct of landclearing or "other [mechanized] excavation." Because virtually all mechanized operations in jurisdictional waters move around grains of soil, Tulloch 2 regulated a vast array of activities regardless of whether material was actually added to the waterbody.[6]

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[5]The May 10, 1999 rule changed the language of Tulloch 1 as follows: Any addition of dredged material into, including redeposit of dredged material other than incidental fallback, within, the waters of the United States. The term includes, but is not limited to the following:*** any addition, including any redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing . . . or other excavation. 64 Fed. Reg. at 25,123.

[6]The preamble to Tulloch 2 offered a predictably cramped explanation of the minimalist changes made from Tulloch 1. In the Tulloch 2 preamble the agencies stated that *National Mining* invalidated Tulloch 1 *only* because it impermissibly regulated incidental fallback. 64 Fed. Reg. at 25,120. While leaving to another day the question of what types of redeposits might constitute incidental fallback, in one portion of the Tulloch 2 preamble the Corps and EPA declared categorically that soil movements associated with "mechanized landclearing" are

E. <u>2000:</u> The *AMC* Court Cautions the Agencies Against Taking an "Unduly Narrow" Interpretation of Non-Regulated Activities.

After Tulloch 2's issuance NAHB returned to the D.C. district court, arguing that the interim rule violated the district court's injunction that forbade the agencies to apply or enforce Tulloch 1. The district court ruled that Tulloch 2 did not violate the injunction because it was only an interim step. However, the court also criticized the agencies' cramped interpretation of incidental fallback, stating that it did "not comport with the Court's understanding . . .." *American Mining Congress v. U.S. Army Corps of Eng'rs,* 2000 U.S. Dist. LEXIS 13953 at *24 (D.D.C. Sept. 13, 2000) (hereafter *"AMC II").* The district court further "caution[ed] [the agencies] against parsing the language of the decisions in *[National Mining]* and *AMC* to render a narrow definition of incidental fallback that is inconsistent with an objective and good faith reading of those decisions." *AMC II,* 2000 U.S. Dist. LEXIS 13953, at *25. To "ensure" that the agencies did not take an "unduly narrow definition" of "incidental fallback," the district court emphasized that the agencies only have authority to regulate some forms of soil redeposits—namely, those that add materials to navigable waters. *Id.* In this regard, the district court emphasized the following language from *National Mining:*

> But [Tulloch 1] makes no effort to draw … a line [between regulated and non-regulated redeposits], and indeed its

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automatically "redeposits…subject to CWA jurisdiction…" *Id.* at 25,121.

> overriding purpose appears to be to expand the Corps' permitting authority to encompass . . . a wide range of activities that cannot remotely be said to "add" anything to the waters of the United States.

AMC II, 2000 U.S. Dist. LEXIS 13953, at *17.

F. 2001: The Agencies Issue Tulloch 3 and "Regard" Vast Categories of Soil Moving Actions as a Regulated "Discharge."

The district court did not strike Tulloch 2, in large measure, because it was an interim rule that would be followed by "a notice and comment rulemaking 'to make a reasoned attempt to more clearly delineate the scope of CWA jurisdiction over redeposits of dredged material.'" *AMC II,* 2000 U.S. Dist LEXIS 13593 at, *19-*20 (citing Tulloch 2, 64 Fed. Reg. at 25,121). That new rule—"Tulloch 3"—is in effect today and governs the agencies' present regulatory regime. Tulloch 3 is another revision of the term "discharge of dredged material." *See* 66 Fed. Reg. 4550 (2001). It suffers from the same defect as its predecessors because it regulates broad categories of activities that move soils *rather than* discharges that add pollutants.

Tulloch 3 declares that, despite whether any addition of material actually occurs, the Corps and EPA "regard" all landclearing and other "earth-moving activity" in navigable waters "as resulting in a discharge of dredged material"—unless the agencies are convinced by "project specific evidence" that the activity results in "only incidental fallback." 66 Fed. Reg. at 4575. Through Tulloch 3, the agencies have effectively presumed that any

earth-moving activity is regulated as a CWA discharge.[7] Whether the activity is plowing or excavation, Tulloch 3 is a sweeping assertion of federal jurisdiction over activities that do not add materials to waters of the United States. Unfortunately and as a result, Tulloch 3 is currently the target of yet another court challenge filed by *Amicus.* See *National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, Civil Action No. 1:01CV00274 (complaint filed Feb. 6, 2001) (consolidated with 1:01CV00320).

With all of their regulatory machinations over the past nine years, the agencies' motivation has become apparent. What they *really* want is to regulate any activity that has an adverse effect on any water anywhere. However, the language of the CWA—specifically the term "discharge of dredged material—sets forth what they may regulate. As the courts in the D.C. Circuit and Judge Gould's dissent below have observed, the agencies should go to Congress to amend the CWA for language that suits their broader agenda.

Borden Ranch's petition provides the Court with the opportunity to clarify the obfuscation that the Corps and EPA have created in the context of one of the CWA's

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[7]When the agencies initially proposed Tulloch 3, they sought to establish a rebuttable presumption that all mechanized earth-moving activities resulted in a regulable discharge. 65 Fed. Reg. 50,108 (Aug. 16, 2000). When they finalized Tulloch 3, the agencies dropped the "presumption" language with the current text that states they "regard" earth-moving activities in waters of the United States as regulated. Tulloch 3, 66 Fed. Reg. at 4575 (Jan. 17, 2001). Word choice aside, the impact on the regulated community is the same: the agencies presume that all mechanized movement of soil in a navigable water will require a section 404 permit.

salient permitting programs. The cycle will continue—more regulatory overreach, followed by more litigation—unless the Court grants the requested petition and clarifies the meaning of "discharge of dredged material."

CONCLUSION

For the foregoing reasons, the National Association of Home Builders urges the Court to grant Borden Ranch's petition.

DATED: April 29, 2002

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IN THE

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amicus, the American Farm Bureau Federation, will address the following questions:

1. Whether the court of appeals' narrow construction of the "normal farming" exemption set out in Section 404(f) of the Clean Water Act, and its expansive construction of that section's "recapture" provision, fail to comport with the statute or its implementing regulations.

2. Whether the court of appeals' misconstruction of Section 404(f) imposes intolerable burdens on farmers and ranchers that Congress did not intend.

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

With the written consent of the parties given and filed with the Clerk of the Court, the American Farm Bureau Federation respectfully submits this brief as *amicus curiae*.[1]

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[1] Counsel for *amicus curiae* have authored this brief in whole and no other person or entity other than *amicus*, its members or counsel have made a monetary contribution to the preparation or submission of the brief.

INTEREST OF *AMICUS CURIAE*

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 5 million member families. AFBF has participated in many cases involving issues of importance to its members in the U.S. Supreme Court, including issues arising under the Clean Water Act (CWA).

AFBF's farmer and rancher members produce virtually every agricultural commodity produced commercially in the United States. They own or lease significant amounts of land on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. In recent years they have become increasingly subjected to restrictive laws and regulations that impair their ability to farm efficiently, and, in some in instances, have eliminated their ability to farm altogether. The protection of wetlands under Section 404 of the CWA poses one of the more onerous regulatory problems production agriculture faces today.

Section 404 of the CWA, 33 U.S.C. § 1344, regulates "the discharge of dredged or fill material into the navigable waters at specified disposal sites." From its inception in 1972 and its court ordered expansion in 1975, the Section 404 permit program remains a very controversial, complex and contentious program. Its application and misapplication to farms and farming have played a key role in its evolution.

AFBF has a direct interest in the outcome of the instant case. AFBF's farmer and rancher members have been severely restricted in the productive use of their lands by the Ninth Circuit's crabbed interpretation of Section 404(f) of the

Clean Water Act (CWA)—an interpretation that eviscerates the Congressional exemption of normal farming practices from the burdens of the CWA's Section 404 permit program. The Ninth Circuit's construction of the statute's exemption and recapture provisions expands the reach of the CWA far beyond what Congress intended, at best creating uncertainties about permissible conduct and at worst exposing farmers and ranchers pursuing routine farming activities to substantial penalties.

AFBF has followed the wetland evolution for nearly three decades and watched it take on a life of its own as it marched relentless up the hill consuming ever-dryer land. Those forces which did not succeed in getting federal land use control legislation in the late 1960s and early 1970s seem to have seized upon the Section 404 wetlands program as a mechanism to control as much of the landscape as possible. The federal agencies, especially the Environmental Protection Agency, Corps of Engineers and the Fish and Wildlife Service, with the aid of the lower courts, have been happy to cooperate in expanding the reach of the Section 404 wetlands program. Now the Ninth Circuit has planted the seeds for further expansion.

AFBF's concerns with the Ninth Circuit's decision can be summarized as follows:

1. The decision clearly narrows the normal farming exemption of Section 404(f)(1) and places the U.S. Army Corps of Engineers and the Environmental Protection Agency in the business of regulating day-to-day farming and ranching practices.
2. The decision disturbingly finds that normal agricultural plowing can result in the discharge of a pollutant.
3. The decision finds that a farmer or rancher's plow can be a point source.

4. The decision expands the Section 404(f)(2) "recapture" provision to the point where a farmer or rancher will not be able to change his cropping patterns or commodity mix without a permit from the federal government or significant concern of a penalty for violating the Clean Water Act.

This Court should grant review because the Ninth Circuit's decision erroneously interprets several key elements of Section 404 resulting in expansive, intrusive and overreaching federal regulatory authority over normal farming and ranching activities which Congress never intended to regulate at all under the CWA. As Judge Gould aptly noted in his dissenting opinion, the majority's decision ignores Congressional intent, eviscerates the CWA's jurisdictional requirements and farmer exemptions, and substantially alters the federal-state framework by permitting federal encroachment upon traditional state authority to regulate land use and agricultural activities.

ARGUMENT

I. THE NINTH CIRCUIT'S CONSTRUCTION OF SECTION 404(f) DOES NOT COMPORT WITH THE TEXT OF THE STATUTE OR ITS IMPLEMENTING REGULATIONS

This case squarely presents an important issue of federal law with significant practical consequences for farmers and ranchers. In 1977, Congress made a deliberate policy choice to exempt the ordinary agricultural activities of farmers and ranchers from the costly and burdensome requirements of the Clean Water Act (CWA) Section 404 permit scheme. Now, the Ninth Circuit in this case has seriously narrowed the scope of the exemption for "normal farming . . . activities" while simultaneously expanding the reach of the statute's so-called "recapture" provision. In so doing, it has extended the scope of the permit requirement far beyond that intended by Congress.

This overreaching has significant adverse consequences for all American farmers and ranchers. It interrupts long established and accepted agricultural practices and adds a new layer of burdensome regulatory compliance requirements and costs. It denies farmers and ranchers full entitlement of property ownership and the ability to farm and ranch in an efficient, flexible, productive and profitable manner. It spawns precisely the regulatory nightmares from which Congress intended to protect farmers and ranchers when it amended the CWA in 1977. This Court should intervene in this case to reinstate the intended breadth of the normal farming exemption.

A. Congress Specifically Amended The Clean Water Act To Exempt Ordinary Farming Activities From The Burdensome Section 404 Permit Scheme

Controlling surface and subsurface water to ensure sufficient, but not overly abundant supply is critical to successful farming and ranching. Thus, it is not surprising that the wetlands protection program enacted in Section 404 of the Clean Water Act of 1972 engendered considerable controversy between the government and the agricultural community when a federal district court ruled that the jurisdiction of the Act extended to waters far beyond "the traditional tests of navigability" and could reach ordinary farmland. See *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

The expansive reach of the Act threatened to impose a permit requirement on enormous numbers of farmers and ranchers whose lands occasionally contained standing water. Section 404 became "a symbol to many Americans of how a well-intentioned legislative initiative can turn into a quagmire of disruption, frustration, and bureaucratic entanglement for ranchers, farmers, foresters, and average citizens of this

country." 4 *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Water Pollution Control Act ("Legislative History")* 902 (1978) (statement of Sen. Bentsen). As the chairman of the Senate Committee on Environment and Public Works observed, the complaints of farmers and ranchers evinced "widespread concern that many activities that are normally considered routine would be made extremely difficult because of the complex regulatory procedures." *Id.* At 897 (statement of Sen. Randolph).

These concerns lead in 1977 to amendments to the Act that provided "for the first time statutory recognition that normal farming, ranching, and silviculture activities do not belong in this permit program." 3 *Legislative History* at 351 (statement of Rep. Hammerschmidt). Congress provided that no permit is required for "the normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting . . . or upland soil and water conservation practices," or "for purposes of construction or maintenance of . . . irrigation ditches, or the maintenance of drainage ditches." 33 U.S.C. § 1344(f)(1)(A), (C). On the other hand, a so-called "recapture" provision stipulated that a permit was required for discharges of dredged or fill material "incidental to any activity having as its purpose bringing an area of navigable waters into a use to which it was not previous subject." *Id.* § 1344(f)(2).

These amendments, as the Seventh Circuit has observed, created "a delicate balance of exceptions that protected wetlands while permitting routine activities to go on unimpeded." *United States v. Huebner*, 752 F.2d 1235, 1241 (7th Cir.), cert. Denied, 474 U.S. 817 (1985). Congress thus made a deliberate policy choice that "[t]he upland farming, forestry and normal development activity carried out primarily by individuals and as a part of a family business or family farming activity need not bear the burden of an effort directed

primarily at regulating the kinds of activities which interfere with the overall ecological integrity of the Nation's waters." Senate Report No. 370, quoted in 4 *Legislative History* at 644. As Senator Muskie, one of the principal Senate sponsors, explained, "[t]he drainages exemption is very clearly intended to put at rest, *once and for all*, the fears that permits are required for draining poorly drained farm or forest land of which millions of acres exist. No permits are required for such drainages." *Id.* At 1042 (emphasis added).

B. Congress Did Not Intend That The Application Of The Normal Farming Exemption Involve The Manufacture Of Artificial Distinctions In Agricultural Land Usage

The Ninth Circuit, rubber stamping the interpretation of overzealous regulators, construed the statutory exemption and implementing regulations very narrowly. It ruled that changing irrigated pasture and forage croplands containing wetlands to vineyards and orchard was akin to the conversion of wetland areas to agricultural uses where none had previously existed.

An examination of the examples of normal farming and ranching activities enumerated in Section 404(f) lends support to the view that Congress did not intend the courts applying the exemption to manufacture artificial distinctions in land usage for various agricultural purposes (such as between pastures and vineyards and orchards). The listed activities include *land preparation* (plowing, seeding), *production* (cultivating, harvesting), and *maintenance* (drainage and conservation). Contrary to the Ninth Circuit's holding, there is absolutely no indication that Congress regarded the precise nature of a farmer or rancher's actions within this wide range of conduct as determinative of the exemptions applicability.

Congress understood the frequency with which farmers and ranchers can, and often must, change and/or diversify their operations to achieve an economically viable or more profitable farming or ranching operation. The transition from one farming or ranching use to another, such as from pasture to planting crops, occurs often in production agriculture. Preparatory activities, which may include draining and plowing and often occur over a period of years, still constitute normal farming and ranching activities.

Pasturing and planting are simply subsets of the myriad activities that comprise "normal farming." Acknowledging this reality, the statute and regulations give farmers and ranchers flexibility to operate within the broad categories of activities (farming, silviculture, and ranching) to which the Section 404 exemption applies, without worrying that the choice between one sort of farming or ranching activity and another on a given piece of land may result in a CWA violation. The Ninth Circuit's ruling that it is the *particular* existing use of a portion of a farm or ranch that counts in determining if the normal farming exemption applies, not the fact that the land is part of a *continuing farming or ranching operation*, destroys this very necessary flexibility and for practical purposes destroys the exemption.

The Ninth Circuit also wrongly construed the recapture provision of Section 404(f) to extend the reach of the CWA into normal farming activities that Congress intended to leave alone. That provision requires permitting for an activity that "bring[s] an area of the navigable waters into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2). The statute provides no further elaboration on the meaning of "use," and the conflicting provisions of the implementing regulations simply confuse matters.

On the one hand, the regulations appear to adopt a broad and flexible approach to farming and ranching "uses" and

"activities" by specifying that a "permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from a silviculture to agricultural use." 33 C.F.R. § 3323.4(C). This provision implies that a conversion from one agricultural use to another—for example, from irrigated forage crop production and pasturing to vineyards and orchards—would avoid the recapture provision. On the other hand, the regulation states categorically that "[a] conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States." *Id.* This latter provision lacks textual or structural support in the CWA, is inconsistent with related regulatory provisions, and, more importantly, conflicts with the intent of Congress. See *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977) ("The question . . . is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations"). Every indication in the statute and regulations, save this one, points to "farming, silviculture, or ranching"—not to "wetlands or non-wetlands"—as the relevant frames of reference for the application of the recapture provision.

Moreover, the legislative history of the normal farming exemption makes clear that Congress did not mean to interfere with the operations of farms and ranches by requiring a permit every time a farmer or rancher makes a change in the productive use of agricultural lands from one crop to another, or from pasture to planting. Congress, as Senator Muskie pointed out, well understood that "draining poorly drained farm[land]" would affect a substantial hydrological alteration to "millions of acres" nationwide. 4 *Legislative History* at 1042. Yet, as the Senator stated, the 1977 amendments established "once and for all" that no permits are required for such activities. *Id.* Accordingly, the Ninth Circuit's contrary ruling notwithstanding, the recapture provision of Section 404(f)(2) does not remove active and

ongoing farming and ranching operations from within the ambit of the normal farming exemption merely because there occurs a change from one agricultural use to another.

C. Plowing Is Not Now And Never Was A Discharge Subject To Section 404 Regulation

On March 27, 1975, the U.S. District Court for the District of Columbia ruled that "navigable waters" extend to "the maximum extent permissible under the Commerce Clause of the Constitution" and are "not limited to the traditional tests of navigability." *Natural Resources Defense Council, Inc. v. Callaway,* 392 F. Supp. 685 (D.D.C. 1975). Many within the U.S. Army Corps of Engineers (Corps) felt this dramatic expansion of federal jurisdiction should at least be confirmed by a higher court, but the U.S. Department of Justice decided against an appeal. Stine, *Regulating Welands in the 1970s, U.S. Corps of Engineers and the Environmental Organizations*, Journal of Forest History, April 1983.

The Corps realized that any challenge to or relief from the court ordered expansion of regulatory jurisdiction would have to take place in the political arena. On May 6, 1975, the Corps released a provocative news release that stated among other things:

> Federal permits may be required by the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land against stream erosion.

The release warned that "millions of people may be presently violating the law" and "may be subject to fines up to $25,000 a day and one year imprisonment." *Id.*

The anticipated firestorm was quick to follow as the story was picked up by newspapers across the country. Environmental groups viewed the news release as a deliberate attempt

by the Corps to sabotage the court order. And the Administrator of the U.S. Environmental Protection Agency, Russell Train, wrote the Chief of the Corps on May 16, 1975 saying:

> We are particularly concerned that the false impression that farmers must obtain permits whenever they plow a field be corrected. Since this was clearly not contemplated by either the Corps or EPA and is not required by the statute, we fail to understand how such a statement could appear in this press release. As you are well aware, the primary concern of section 404 is to address situations where dredged or fill material is discharged into wetland areas. By no stretch of the imagination can the simple act of plowing be considered to fall under that category.

Id. No one can dispute that the environmental community and the federal government's key official for administering the CWA, the Administrator of the EPA, made it clear in 1975 that plowing was not a discharge subject to Section 404 regulation.

Responding to the furor raised by the May 6, 1975 news release, the Corps included in the definitions of "dredged material" and "fill material" an *exclusion* for "[m]aterial resulting from normal farming, silvacutire [sic], and ranching activities, such as plowing, cultivating, seeding, and harvesting, for the production of food, fibre, and forest products. 33 C.F.R. § 209(d)(4) and (6) (July 25, 1975). As the Corps made clear in the preamble to those regulations, material resulting from these practices was neither fill nor dredged material, thus excluded from regulation under Section 404. This exclusion, along with some other exclusions written into the Corps' 1975 regulations, and concurred in by the EPA, became the catalyst for the statutory exemptions enacted by Congress as Section 404(f) of the 1977 amendments to the CWA. But it is important to note that Congress *exempted* what the Corps had already *excluded*. In other words, Congress said any discharges of dredged or fill material

resulting from these practices were exempt from regulation whereas the agencies had already said these practices were not a discharge of dredged or fill material in the first place.

It is important to distinguish between an "exclusion" and an "exemption". An excluded activity is one determined not to involve a discharge in the first place and is thus not subject to any program regulating discharges. An exempted activity is one that does involve a discharge, but that discharge has been statutorily exempted from regulation subject to a so-called recapture provision.

There is nothing in the statute or the legislative history to suggest that Congress intended to no longer treat these practices as exclusions. In fact the legislative history includes a number of references indicating an intent to endorse the exclusions. In House debate on December 15, 1977, Congressman Hammerschmidt stated:

> On the positive side, we will now have for the first time statutory recognition that normal farming, ranching and silviculture activities do not belong in this permit program. *These exemptions reemphasize that Congress never intended these activities to be considered discharges of dredged or fill material.* (Emphasis added)

Report on Resolution Providing for Consideration of Conference Report on H.R. 3199, Clean Water Act of 1977, 351.

On the Senate side, Senator Baker stated:

> Second, conferees adopted the Senate amendment to section 404 that clarifies the *exclusion* of activities that do not involve point source discharges, such as *plowing* and upland conservation activities, *and exempts others* that may involve discharges or other placements of dredged or fill material that will be sucessfully controlled by management practices and performance standards imposed through the section 208 program.

* * *

The conferees agreed to adopt the approach taken by the Senate in the Senate-passed bill with respect to activities performed by the farming, forestry and mining industries. First the conference bill clarifies *the exclusion of activities that do not involve point source discharges of dredged or fill material, such as plowing*, seeding, cultivating, harvesting, and upland conservation and minor drainage practices. The conference bill also responds to testimony received in both the House and Senate committee hearings on the section 404 question by *specifically exempting other farming, forestry, and mining practices that do involve minor discharges of dredged or fill material* such as stock and farm ponds, logging roads, temporary mining roads, and farm roads. It is expected that these activities, while exempt from permit requirements, would still be subject to section 208 including the best management practices approved by EPA and imposed through a statewide regulatory program. (Emphasis added)

Id. at 524.

By not dealing with the issue of exclusion versus exemption in the statute itself, Congress confused the issue as to whether plowing is an exclusion, an exemption or both. Nevertheless, the argument can be made that some forms of plowing, not meeting the definition prescribed for excluded plowing, would still result in plowing that is exempted. A joint field memorandum issued by the Corps and the EPA in 1990 lends support to this argument by stating: "For example, plowing that is exempt under Section 404(f) means all mechanical means of manipulating soil, *including land leveling*, to prepare it for planting of crops." EPA and Department of the Army, Memorandum for the Field, May 3, 1990 (emphasis added). Land leveling is not included in the definition of plowing used for the exclusionary statement in Corps regulations.

The distinction between an "exclusion" and an "exemption" would not be important were it not for the fact that the exemptions enacted in 1977 in Section 404(f)(1) were subject to recall if they triggered the restrictions of Section 404(f)(2), the so-called "recapture" provision. Under Section 404(f)(2), an otherwise exempt discharge is "recaptured" if there is a change in use of waters and a flow/circulation impairment or reach reduction. Because of the federal government's increasing desires to control activities that harm wetlands, the Corps and the EPA have narrowed the scope of the exemptions through the years by use of this recapture provision. But they have not changed their 1975 decision that normal plowing is *excluded*.

After Attorney General Benjamin Civiletti opined September 5, 1979 that the EPA and not the Corps had the ultimate authority to construe the meaning of the Section 404(f) exemptions, EPA adopted in 1980 regulations defining "plowing" and concluded with a sentence supporting the 1975 decision that plowing was not a discharge in the first place. The Corps adopted the same language in 1982. Both agencies have since overhauled their regulations that include the definition of plowing, but have not changed the 1980 definition. Of greater significance, both agencies continue to carry a clear statement at the end of the definition that plowing conforming to the definition is "never" a discharge:

> Plowing means all forms of primary tillage, including moldboard, or wide-blade plowing, discing, harrowing, and similar physical means used on farms, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities

> which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. *Plowing, as described above, will never involve a discharge of dredged or fill material.* (Emphasis added).

EPA regulations 40 C.F.R. 232.3(d)(4) and Corps regulations 33 C.F.R. 323.4(a)(1)(iii)(D).

In addition, and lending further support to the conclusion that plowing, like that which took place in the instant case, is excluded from Section 404 regulation, the EPA stated in the preamble to it regulations: "Several commentators questioned the requirement that plowing take place on established farm or forest lands. This requirement has been deleted."

D. "Deep Ripping" Is Normal Plowing

"Deep ripping" is but one of numerous types of normal plowing that farmers and ranchers routinely employ in the conduct of their production agricultural activities. The basic purpose of "deep ripping" is to provide hardpan penetration (a basic purpose and result of all types of plowing) *and* at the same time form root beds that allow ample plant root development as well as water infiltration and retention. See *Agricultural Resource Management Study (ARMS), Phase II—Production Practices, Interviewer's Manual*, U.S. Department of Agriculture, National Agricultural Statistics Service, August 2000.

The term "deep ripping" can refer to plowing that involves depths ranging from a few inches for such crops as lettuce, soy beans, wheat, cotton, and pumpkins, to several feet for grape vines and fruit trees. *See i.e.*, Rester, *Subsoiling to Increase Cotton Yields,* Louisiana State University, Ag Center Research & Extension (deep ripping 12 to 15 inches to fracture hardpans); *2001 Virginia Cotton Production Guide*, Virginia Cooperative Extension Service, Virginia Tech

(ripping and bedding 6 to 9 inches); *For More Soybeans, Dig Deep*, Agriculture Research, February 1999 (deep tillage to a depth of 12 to 16 inches); *The Mid-Atlantic Wine Grape Grower's Guide*, North Carolina State University (subsoiling 18 to 24 inches); *Irrigating Deciduous Fruit and Nut Trees in Oregon*, Oregon State University Extension Service, May 1996 (deep ripping to 4 feet). It is also a recommended practice by both state agricultural extension services and environmental quality agencies for not only improved crop yields, but also for disease control and water conservation and quality control. *See i.e., Minimum tillage practices affect disease and yield of lettuce*, California Agriculture, January-February 2002 (deep ripping 15 to 20 inches); *Small Ranch*, University of Nevada at Reno (controlling soil erosion due to compacted soil runoff by deep ripping and planting or mulching); *Irrigation Management Practices To Protect Ground Water And Surface Water Quality, State of Washington*, EM4885, Washington State Department of Ecology and Cooperative Extension, Washington State University (rip hardpans and compacted soils to improve filtration rates).

The fact that "deep ripping" may not be performed annually or on a frequent basis does not make it any less a "normal" plowing activity for production agricultural purposes. The frequency with which it is performed depends upon matters of soil compaction and crops. It may be performed only once in connection with the establishment of a vineyard or orchard, once every several years where no-till practices are used, or it may be performed annually in the growing of row crops or grains. Frequency is not the determining factor in what constitutes "normal" in production agriculture; crops, conditions, technology and results are.

Depth and frequency of occurrence have nothing to do with normal plowing for purposes of the Section 404(f) agricultural exemption. As previously indicated, the purposes of "deep ripping" are twofold: hardpan penetration *and* root bed preparation. Hardpan penetration usually takes place

within a matter of a few inches. Otherwise the depth to which "deep ripping" is to be performed depends upon the root bed needed for the particular type of crop to be planted, and this depth may range from a few inches to several feet. In sum, "deep ripping" is "normal" plowing and a normal farming or ranching activity that is excluded or exempted from Section 404 regulation.

II. THE NINTH CIRCUIT'S MISCONSTRUCTION OF SECTION 404(f) IMPOSES INTOLERABLE BURDENS ON FARMERS AND RANCHERS

The Ninth Circuit's construction of Section 404(f) to require farmers and ranchers to obtain a permit to convert wetland forage crop and pasture lands into vineyards and orchards imposes significant financial and administrative burdens; loss of time completing and processing bureaucratic paperwork, legal fees, delay and uncertainty, potential fines, and loss of productive land—all costs that will either make farming and ranching less profitable and thus less desirable as an investment and livelihood, or will drive up the prices charged to consumers for food and other basic necessities. The administrative nightmare associated with the Clean Water Act Section 404 permit scheme often deters farmers and ranchers from even applying for a permit and discourages all but the most determined from challenging a permit denial in the courts.

Congress envisioned no such consequences when it amended the CWA in 1977. The legislative history is replete with statements showing Congress intended that the exemption scheme would give farmers and ranchers real protection. By 1977, Section 404 "ha[d] become synonymous with Federal overregulation, overcontrol, cumbersome bureaucratic procedures, and a general lack of realism." 4 *Legislative History* at 903 (statement of Sen. Bentsen). Congress undertook to amend the CWA to reflect "the fact that we never intended under Section 404 that the Corps of

Engineers be involved in the daily lives of our farmers, realtors, [and] people involved in forestry." *Id.* at 924 (statement of Sen. Domenici). The resulting exemption of normal farming activities from the permit requirement, Congress hoped, would "greatly simplify the administrative process and reduce the potential redtape burden." *Id.* at 897 (statement of Sen. Randolph).

As this case perfectly demonstrates, implementation of the normal farming exemption has not proceeded as Congress intended. The interpretation and administration of the Section 404 normal farming exemption by the Environmental Protection Agency and the U.S. Army Corps of Engineers in this case, acquiesced in by the Ninth Circuit, have not fulfilled Congress' aim of minimizing the interference of federal regulators in the routine decisions of farmers and ranchers.

This is not a case about a farmer or rancher indiscriminately discharging dredged or fill material into navigable waters. This is a case of a farmer attempting to plant a different crop on his farmland, a very normal farming activity.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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In The
SUPREME COURT OF THE UNITED STATES

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS, Petitioners,
v.
UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether deep plowing ranchland to plant deep-rooted crops constitutes the "addition" of a "pollutant" (the plowed soil) from a "point source" (the plow) so as to fall within the regulation of Section 404 of the Clean Water Act.

2. Whether deep plowing ranchland which is farmable in its natural state to plant deep-rooted crops is statutorily exempt from regulation under Section 404(f)'s exemption for any discharge from "normal farming * * * activities such as plowing."

3. Whether the Clean Water Act's civil penalty section, authorizing penalties "not to exceed $25,000 per day for each violation," authorizes assessing the maximum daily penalty for each time a plow crosses a seasonal drainage feature, without regard to the number of days when such activity occurred.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1-22) is reported at 261 F.3d 810. The district court's opinion on summary judgment (Pet. App. 28-56) is unreported. Its decision after the counterclaim trial (Pet. App. 67-121) is unofficially reported at 1999 WL 1797329.

JURISDICTION

The court of appeals' judgment was entered August 15, 2001. On November 28, 2001, the court of appeals denied petitioners' petition for rehearing *en banc*. Pet. App. 208. The petition for writ of certiorari was filed on February 25, 2002, and granted on June 10, 2002. The jurisdiction of this Court rests on 28 U.S.C. Section 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Clean Water Act, 33 U.S.C. Sections 1311 et seq., together with pertinent parts of the relevant regulations, 40 C.F.R. Section 232, and 33 C.F.R. Section 323, are reproduced at Pet. App. 209-218. The Corps' and EPA's December 1996 Field Memorandum regarding deep plowing is set forth at Pet. App. 199.

STATEMENT

The fundamental issue in this case is whether a farmer and rancher may deeply *plow* his agriculturally-zoned, semi-arid ranchland to plant higher value crops without need of a federal permit or, conversely, whether the U.S. Army Corps of Engineers ("Corps") has jurisdiction to regulate such ac-

tivity under the Clean Water Act ("CWA" or "Act").[1] The Corps asserts that the traditional farming activity of *plowing alone* of dry ground in areas of seasonal wetlands constitutes the "addition" of "pollutants" (native soil) from a "point source" (the plow) which is regulated under the "dredge and fill" permit program it administers under CWA Section 404.

The Ninth Circuit majority (Gould, J., dissenting) upheld the Corps' expansive claim of jurisdiction over traditionally local activities. It held that deep plowing – which does not "add" or convey materials from any "point source," and merely results in native soil being turned within the same general location – produces a "regulable redeposit" of the plowed soil "pollutant" because it "constitutes environmental damage sufficient to constitute a regulable redeposit." Pet. App. 8. The majority relied on the Ninth Circuit's prior decision holding redeposits of processed materials extracted from in stream placer mining operations are regulated, and a Fourth Circuit decision holding "sidecasting" from backhoe dredging to drain wetlands for residential subdivision construction is regulated. *Rybachek v. United States,* 904 F.2d 1276, 1285 (9th Cir. 1990); *United States v. Deaton*, 209 F.3d 331, 333-336 (4th Cir. 2000). Pet. App. 6-8. Dissenting Judge Gould would have followed the D.C. Circuit Court of Appeals' contrary decision in *National Mining Ass'n v. U.S. Army Corps of Eng'rs.*, 145 F.3d 1399, 1404 (D.C. Cir. 1998), and held "the return of soil in place after deep plowing is not a 'discharge of a pollutant.'" Pet. App. 18.

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[1] While this Court's recent decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs. ("SWANCC")*, 531 U.S. 159 (2001), addressed the scope of *geographic* jurisdiction under the CWA, this case addresses the distinct issue of *activities* jurisdiction. See Benjamin H. Grumbles, *Section 404(f) of the Clean Water Act: Trench Warfare Over Maintenance of Agricultural Drainage Ditches*, 17 Wm. Mitchell L. Rev. 1021, 1025 (1991) (distinguishing concepts of "activities" and "geographic" jurisdiction).

Despite the CWA's express statutory exemption for any "discharges" from "normal farming * * * and ranching activities such as plowing," Pet. App. 210, the Ninth Circuit majority also held Section 404(f) "recaptures even normal plowing" that prepares land for a new crop because "[c]onverting ranch land to orchards and vineyards * * * [brings] land 'into a use to which it was not previously subject.'" *Id.* at 10, 211.

The Ninth Circuit's decision conflicts with the CWA's plain language, statutory scheme and legislative history, the Corps' *authorized* regulations and guidance, and principles of federalism. Section 404 applies only to "discharges" of "pollutants," defined as "addition" of pollutants to navigable waters from a "point source." 33 U.S.C. §§ 1362(16), (12). The activity of plowing alone does not "add" pollutants and does not produce regulated point source "discharges." To the contrary, the relevant statutes, regulations and regulatory guidance expressly exclude *all forms of plowing* from Section 404 regulation, an exclusion clarified and confirmed by Section 404(f)(1)'s "farming exemptions" and by abundant legislative history evincing Congress never intended to regulate plowing. No other case has invoked the facially-narrow "recapture provision" to hold that any form of plowing *alone* – as opposed to plowing conducted incidental to and as a minor part of *other activities* primarily intended to fill and dry out waters or wetlands – is a CWA-regulated activity.

Congress did not intend to federalize regulation of traditionally local land use matters and agricultural activities when it adopted the CWA. It did not envision when it enacted the CWA and its "farmer exemptions" that a farmer or rancher desiring to plow his field to plant higher value crops – a normal activity engaged in since colonial times, Pet. App. 18 – would require a federal permit for the "discharge" of "pollutants" from a "point source" to do so.

A. The Statutory and Regulatory Scheme.

1. The Elements of Section 404 Jurisdiction.

CWA Section 404 authorizes the Corps to regulate "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a); Pet. App. 210. Section 301(a) provides that any such discharge requires a permit. § 1311(a); Pet. App. 209. "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." § 1362(16), (12); Pet. App. 212. As a prerequisite to the existence of a regulated point source "discharge," the statute's plain text requires an "addition" of a "pollutant." To "add" is "to join or unite (to) so as to increase the number, size, quantity, etc." Webster's Dictionary Of The English Language Unabridged (Encycl. ed. 1977), p. 21.

The Corps' regulations provide in pertinent part:

> The term *discharge of fill material* means the addition of fill material into waters of the United States. * * * *The term does not include plowing*, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

33 C.F.R. § 323.2(f), emph. added. The EPA's and Corps' regulations defining "plowing" likewise expressly *exclude* it from Section 404 regulation as a "non-discharge":

> *Plowing means all forms of primary tillage*, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means *utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops.* * * * *Plowing* as described above *will never involve a discharge* of dredged or fill material.

33 C.F.R. § 323.4(a)(1)(iii)(D) (Corps regulation), emph. added; Pet. App. 216; see *id.* at 218, citing 40 C.F.R. § 232.3(d)(4) (parallel EPA regulation).

While the Corps' initial regulations implementing the 1972 CWA did not address plowing,[2] interim final regulations published in 1975 (40 Fed. Reg. 31320) and final regulations published July 19, 1977 (42 Fed. Reg. 37122) expressly addressed and exempted materials produced or resulting from "normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting" from the definitions of "dredged" or "fill material." 40 Fed. Reg. at 31321, 31325; 42 Fed. Reg. at 37124, 37130, 37145.

The Corps' 1975 and 1977 regulations excluding plowing and other normal farming activities from the Section 404 program were in place prior to the 1977 CWA amendments adding a statutory exemption for these activities. See 45 Fed. Reg. 62732 (1980). As stated by Assistant Secretary of the Army Victor Veysey in 1975 testimony to a House subcommittee: "We must dispel fallacies that the Corps is proposing to regulate a farmer plowing his field." See *Corps Issues Interim Rules For Discharges of Dredged and Fill Materials*, 5 Envtl. L. Rep. 10143 (1975).

As explained in the preamble to the Corps' 1977 regulations:

> The [1975] regulations * * * identified certain types of activities that were excluded from the program because they do not involve the discharge of dredged or fill material into water. Plowing, seeding, cultivating, and harvesting for the production of food, fiber, and forest products were included in this list of excluded activities.

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[2] See 38 Fed. Reg. 12217 (1973); 39 Fed. Reg. 12115 (1974).

42 Fed. Reg. at 37124 (1977). As further explained by the Corps:

> We intended * * * to make it clear that activities such as plowing, seeding, harvesting, cultivating and any other activity by any industry that do not involve discharges of dredged or fill material cannot be included in the program. * * * We have * * * clarified our intent by stating at the end of our definitions of "discharge of dredged material" and "discharge of fill material" that plowing, seeding, cultivating and harvesting for the production of food, fiber, and forest products are not included in the Section 404 program.

42 Fed. Reg. at 37130 (1977); see *id.* at 37145 (definitions of discharge of dredged and fill material at 33 C.F.R. § 323.2(l), (n) excluding plowing, etc.).

As confirmed in the Corps' February 1986 Regulatory Guidance Letter, No. 86-01 ("RGL 86-01") on the subject:

> *Plowing* for the purpose of producing food, fiber, and forest products and meeting the definition in Section 323.4 *will never involve a discharge* of dredged or fill material. *Such plowing is not subject to any of the provisions of Section 404 including the Section 404(f) exemption limitations.* Section 404(f) is applicable to those activities that do involve a discharge but are statutorily exempted from the need to obtain a 404 permit. (Emph. added.)[3]

While plowing is not dredging,[4] agencies and courts have also addressed the meaning of "addition" in the context of

[3] RGL 86-01 has been lodged with the Clerk of the Court.

[4] Although the district court denied that *dredging* concepts and regulations, including the reasoning of the *National Mining* case, have any relevance to plowing activities, Pet. App. 38, fn. 7, the Ninth Circuit majority relied wholly on dredging cases in affirming the judgment against petitioners. Pet. App. 6-7. Whether "dredged" or "fill" material is involved, the "addition" requirement for CWA Section 404 jurisdiction is the same.

deciding whether incidental soil movement occurring during *dredging* operations is regulated under Section 404. In the preamble to its 1986 regulations, the Corps stated (51 Fed. Reg. 41206, 41210 (1986)):

> Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a 'discharge of dredged material,' we would, in effect, be adding the regulation of dredging to Section 404 which we do not believe was the intent of Congress. We have consistently provided guidance to our field offices since 1977 that incidental fallback is not an activity regulated under Section 404. The purpose of dredging is to remove material from the water, not to discharge material into the water.

The EPA and Corps reversed this previously longstanding position that "incidental fallback" is not a regulated "addition" by adopting regulations in 1993 redefining "discharge of dredged material" at 33 C.F.R. § 323.2(d) and 40 C.F.R. § 232.2(e), as part of the settlement of *North Carolina Wildlife Federation v. Tulloch*, Civ. No. C90-713-CIV-5-BO (E.D.N.C. 1992). See 58 Fed. Reg. 45008. The so-called "*Tulloch* Rule" purported to extend the Corps' jurisdiction to "[a]ny addition, including any redeposit, of dredged material, * * * into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 58 Fed. Reg. at 45037.[5]

[5] At the same time the EPA and Corps continued to acknowledge several pertinent points. First, "EPA and the Corps agree * * * that the presence of a 'discharge' into waters of the U.S. is an absolute prerequisite to an assertion of regulatory jurisdiction under Section

In 1998, the D.C. Circuit struck down the *Tulloch* Rule, holding that "incidental fallback" of native material from a dredge bucket during aquatic dredging operations is not an "addition" of pollutants and thus not a "discharge" regulated under Section 404, because no materials are added and the disturbed native materials fall back to their same general location. *National Mining,* 145 F.3d at 1404.

In the case at bar, the courts below treated (1) plowing as involving a "discharge" (and, hence, "addition"), (2) plowed native soil as both a "pollutant" and "fill material," and (3) plows themselves as regulated "point sources." "Pollutants" within the Act include, *inter alia*, "dredged spoil, * * * biological materials * * * rock, sand, cellar dirt * * * and agricultural waste discharged into water." § 1362(6); Pet. App. 211. "Fill material" is material used for the "primary purpose" of replacing an aquatic area with dry land or changing the bottom elevation of a water body. *Resource Invs., Inc. v. U.S. Army Corps of Eng'rs.,* 151 F.3d 1162, 1168 (9th Cir. 1998); *National Mining,* 145 F.3d at 1402, fn. 1. A "point source" is "any discernible, *confined and discrete conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." § 1362(14); Pet. App. 212, emph. added.

The "navigable waters" over which the Corps asserts jurisdiction on the semi-arid Borden Ranch are widely dispersed seasonal drainage swales and intermittent drainages. These are shallow linear features ranging from several inches to several feet wide, and up to several hundred feet long,

404." 58 Fed. Reg. at 45011. Second, it is "flatly incorrect that this rule would trigger Section 404 jurisdiction over a discharge based upon the environmental effect of the associated activity." *Ibid.* Third, "We agree * * * that Section 404(f)(2) does not expand the scope of activities subject to Section 404." *Id.* at 45012.

which carry stormwater runoff for brief periods only during and after seasonal rains, and which ultimately drain to intermittent streams, which themselves ultimately flow to tributaries of navigable waters. Pet. App. 2; ER1011-12.[6] The Corps defines wetlands as areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b).

2. The CWA's Farming Exclusions and Exemptions.

Even though the Corps' regulations already specifically excluded normal farming activities from the Section 404 program as not involving a "discharge," in 1977, Congress amended Section 404 to expressly codify and expand the "farming exemptions" to exempt any "discharge"

> *from normal farming*, silviculture, *and ranching activities such as plowing*, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. (Emph. added.)

33 U.S.C. § 1344(f)(1)(A); Pet. App. 210.

Section 1344(f)(2)'s textually narrow "recapture" exception – which, as recognized by the Corps' and EPA's regulations specifically defining "plowing" and the Corps' RGL 86-01, does not apply to plowing because plowing involves no "discharge" – requires a permit for:

[6] As cited herein, "ER" is the "Excepts of Record" from the Ninth Circuit's proceedings, "CR" is the Court Record, taken from the district court's Docketing Sheet, and "TE" is a district court Trial Exhibit.

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, *where* the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.

§ 1344(f)(2); Pet. App. 211, emph. added.[7]

In conflict with two decades of its own regulations and guidance, the Corps on December 12, 1996, for the first time issued public guidance distinguishing "deep ripping" from other forms of plowing. Corps/EPA Memorandum to the Field., Pet. App. 4, 199-207. The 1996 Field Memorandum was never adopted as a regulation through formal notice and comment rulemaking procedures; it came nearly 20 years after the 1977 "farming exemption" amendments to the CWA, and only *after* Tsakopoulos' dedication of a 1418-acre preserve and *after* all Borden Ranch plowing operations at issue in this case had already occurred. Pet. App. 103; CR189, ER1043:12-15; TE78, 80, 83, 85, 88; ER90, 97, 133, 148, 158, see CR204, ER909.

The 1996 Field Memorandum asserts that "Deep ripping to establish a farming operation at a site where a ranching * * * operation was in place is a change in use of such site." Pet. App. 206. On this basis, for the first time ever, the Corps asserted that a form of *plowing alone* is subject to Section 404 regulation *and* that a mere change in crop – from forage to grapes or apples – is a "change in use" coming within the recapture provision. The Memorandum also appears to argue that "deep ripping," while it is concededly done to "break up" soil "to prepare a site for establishing crops," Pet. App.

[7] The statute thus requires *two* separate elements for "recapture" of discharges from an otherwise exempt activity: (1) a new use to which the waters were not previously subject, *and* (2) consequent and intended impairment of flow or reduction in reach of navigable waters.

204, 202, is nonetheless "distinguishable from plowing" based on *where* it occurs (sometimes in seasonal wetland areas), its *depth*, and its *effects* on site hydrology. Pet. App. 204-205. The Memo goes so far as to state that the hydrological effect of deep plowing – and presumably *any* exempt plowing – *alone* is sufficient to trigger the "recapture" provision, regardless of whether the area is brought into a use to which it was not previously subject. See Pet. App. 206 ("altering or removing the wetland hydrology of the site" alone triggers recapture).

3. The Penalty Provision.

33 U.S.C. Section 1319(d), Pet. App. 209, authorizes civil penalties "not to exceed $25,000 **per day** for **each violation**" for discharging pollutants without a permit. Similar "per day of violation" language appears in the Act's *criminal* penalty provisions as well. 33 U.S.C. §1319(c).

B. Petitioners' Plowing Activities On Borden Ranch and the Corps' Assertion of Jurisdiction.

The 8,400-acre Borden Ranch is agriculturally-zoned, Central Valley land, located in Sacramento and San Joaquin Counties, that is bisected by Dry Creek, the County Line. Presently owned by Borden Ranch Partnership ("BRP") (Tsakopoulos is managing partner and title holder) and its vendees, the Ranch has historically been used for cattle grazing, irrigated pasture, and growing wheat, hay, alfalfa, and row crops. Since late 1993, portions have been deep plowed and planted to vineyards and orchards. The Ranch contains seasonal hydrological features such as swales and intermittent drainages (both hereinafter "drainages"). ER1011-12; Pet. App. 2-3. The Corps asserted jurisdiction over these drainages as "navigable waters" and contended that deep plowing rangeland in delineated "waters" discharges dredged or fill material and requires a Section 404 permit. CR189, ER1013-1015; Pet. App. 3.

Despite the Act, their own regulations, and RGL 86-01, which entirely exclude (as "non-discharges") *all* forms of plowing from Section 404 regulation, the Corps and EPA purported to distinguish deep plowing from shallower plowing for purposes of regulation. The Corps contended plowing in seasonal wetlands to "root zone depth" is not regulated but that deep plowing in the same areas is.[8] The Corps and EPA contended that deep plowing would adversely affect "navigable waters" by puncturing restrictive subsurface soil layers believed integral to their inundation and functioning. TE30, ER13-15, 20-21, TE31, Pet. App. 2-3. Relying on the Corps' contradictory oral and written advice differentiating among different forms of plowing based on depth, Tsakopoulos tried to plow in ways the Corps told him would not require permits. CR204, ER921:8-16.

In response to Tsakopoulos' questioning of the basis of its authority to regulate his farming activities, the Corps – itself in doubt – sought guidance from EPA in 1994 as to whether the CWA's "farming exemptions" applied to Tsakopoulos' deep plowing. TE21, ER7. Unsurprisingly, EPA endorsed the Corps' asserted jurisdiction, and the Corps in late 1994 again attempted to distinguish deep plowing from shallow plowing at root zone depth, which it conceded was authorized in areas of the Corps' geographic jurisdiction under the exemptions without a permit, and which one Corps regulator testified was 18 to 24 inches into the soil. TE30, ER13, CR204, ER910:18 – 911:2. Tsakopoulos authorized further plowing under the Corps' guidance until the winter rainy season, when it is not possible to plow any areas (whether "upland" or "wetland") once the ground becomes wet. CR204, ER909:3-6, CR226, ER981-983.

[8] TE30, ER13. The phrase "root zone depth" does not appear in the Act or any Corps or EPA regulations, none of which purport to distinguish between exempt and non-exempt forms of plowing by depth.

In 1995, Corps and Federal Natural Resources Conservation Service ("NRCS") officials met at the Ranch to discuss Tsakopoulos' plowing plans for that year. NRCS advised that "deep-ripping" through drainages *had no adverse hydrological impact and was a good farm management practice.* CR204, ER915:11-20. The Corps nevertheless continued to assert jurisdiction over deep plowing, but told Tsakopoulos he could deep plow uplands and also cross "waters/wetlands" provided that when he did so he raised the plow shank. TE31, ER20, TE558, ER16; see Pet. App. 3. Tsakopoulos attempted to comply. CR204, ER921:8-16. The Corps and EPA later claimed noncompliance, however, and issued a November 1995 cease and desist order. Pet. App. 3; TE50, ER30. Without conceding wrongdoing, Tsakopoulos settled the alleged 1994 and 1995 plowing violations in May of 1996, by dedicating a 1418-acre seasonal wetlands preserve in the heart of Borden Ranch. Pet. App. 3-4, 165, 176; TE66, ER33, TE592, ER65.

In September 1996, Corps and EPA officials provided guidance for 1996 plowing on the Ranch and reconfirmed that without a permit Tsakopoulos could deep plow uplands and cross the narrow, dry and widely-dispersed drainages with the plow shank raised. CR204, ER922-926. Tsakopoulos again attempted to comply. TE617, ER96, TE615, ER88, CR227, ER994-995, CR226, ER984-987.

Following completion of all plowing activities at issue in this action (see TE78, 80, 83, 85, 88, ER90, 97, 133, 148, 158), the Corps issued the December 12, 1996 Field Memorandum, purporting to distinguish – for the first time ever in any publicly available guidance – "deep ripping" from other forms of plowing for purposes of regulation under Section 404. In light of the past difficulties, Borden Ranch applied in late January 1997 for a CWA Section 404 permit for its re-

maining portions of Borden Ranch. Pet. App. 41, fn. 11, 81.[9] After the 1996-1997 rainy season, the Ranch also resumed shallow plowing (disking). Almost immediately, EPA representatives unaware of the September 1996 guidance descended on the site and saw shallow furrows through some drainages (from raised deep plow shanks). CR226, ER970:17-973:23; Pet. App. 4. Ignoring written and oral concerns expressed by EPA's Washington headquarters that deep plowing *might not produce jurisdictional discharges* in light of the district court's then-recent *National Mining* decision, TE630, ER309, EPA Region 9 issued an April 1997 cease and desist order stopping all Borden Ranch activity involving machinery crossing drainages, TE103, ER313; Pet. App. 4, resulting in enormous economic damages to Borden Ranch.

C. Petitioners' Challenge To The Corps' Jurisdiction Over Plowing And The District Court's Ruling.

Petitioners filed suit challenging the Corps' and EPA's regulation of plowing activities on Borden Ranch. CR1, ER328. The Government counterclaimed alleging CWA violations by "filling waters of the United States." CR7, ER385; Pet. App. 4.[10] The district court denied Tsakopoulos' summary judgment motion, and partially granted the Government's motion, leaving for trial the Counterclaim alleging CWA violations. Pet. App. 28-56, CR74, ER500-526; Pet. App. 4-5.

[9] The Ranch had previously been issued "after-the-fact" permits by the Corps authorizing the plowing previously done. Pet. App. 72, 74, 77-78.

[10] The Government chose to stop processing Borden Ranch's pending CWA Section 404 permit application as a result of the litigation, Pet. App. 41, fn. 11, and refused to further process it as a possible means of resolving the dispute despite Borden Ranch's repeated requests that it do so.

Following a bench trial, the district court found 348 separate deep plowing violations in 29 widely dispersed drainages (aggregating "about 2 acres" in total area). Pet. App. 67-121. Despite Tsakopoulos' acknowledged efforts to follow the Corps' guidance, Pet. App. 143-144, the district court's finding that the violations "affected a relatively small area of jurisdictional waters" (Pet. App. 105), and its finding that the "acreage involved in these violations constitutes a miniscule fraction of the total land converted to vineyards" (Pet. App. 109), the court nevertheless imposed a **$1.5 million civil penalty**, although Tsakopoulos could, and did, elect to substitute a four-acre restoration project for $1 million of the penalty. Pet. App. 5, 118.[11]

D. The Ninth Circuit's Divided Decision.

The Ninth Circuit in relevant part affirmed the district court in a divided 2-1 decision. The majority reasoned that this case was like *Rybachek*, 904 F.2d 1276, which held placer mining, i.e., extracting raw materials from a stream, processing them to remove gold, and later returning the mining overburden to the stream at a distance from the original location, constituted "addition" of a "pollutant" and hence a "discharge." It also relied on *Deaton*, 209 F.3d 331, which held "sidecasting" materials from digging a 1240-foot drainage ditch to drain wetlands for residential subdivision construction produced a regulated "discharge." Pet. App. 6-8. The majority rejected petitioners' argument that deep plowing to prepare land for new crops is wholly unlike those dredging activities and even less like an "addition" of pollutants than the "incidental fallback" the D.C. Circuit in *National Mining* held unregulated under Section 404. It distin-

[11] Placing the matter in further perspective, under the Corps' regulations in effect at that time, as admitted by the Colonel in charge of the Corps' Sacramento office, up to *one acre* of wetlands could be *completely* filled and destroyed without obtaining a CWA Section 404 Permit. Aug. 24, 1999 Reporter's Transcript, 127:4-8 (first day trial testimony of Corps' Col. John N. Reese).

guished *National Mining* in a footnote, asserting deep plowing "does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit." Pet. App. 8, fn. 2.

Rejecting petitioners' argument that plows are not "point sources," the Ninth Circuit relied on a Fifth Circuit case holding "bulldozers and backhoes" can constitute "point sources" where they are performing *earthmoving, excavation* and *ditching* activities with engaged *blades* and *shovels* to dry out water bodies. Pet. App. 8-9; see *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 901, 920-921, 926-927 (5th Cir. 1983).

The Ninth Circuit also rejected petitioners' argument that deep plowing is in any event exempt from regulation (and not recaptured) under the CWA's exemptions for "normal farming * * * and ranching activities such as plowing." Pet. App. 9-10. The Court held that "even normal plowing can be regulated under the [CWA] under the so-called 'recapture' provision," and that *any* farming activity that "changes a wetland's hydrological regime is non-exempt." *Ibid.*

Finally, affirming the $1.5 million civil penalty, the Ninth Circuit ignored conflicting authority in interpreting 33 U.S.C. § 1319, Pet. App. 209, to allow assessment of the maximum daily penalty for each time a plow shank crossed a drainage without regard to the number of days on which the activity occurred. Pet. App. 13-16.

Dissenting, Judge Gould would have held "that the return of soil in place after deep plowing" does not produce a regulated "discharge" because it "does not involve any significant removal or 'addition' of material to the site." Pet. App. 18-22. Judge Gould would also have held the farming exemptions applicable to "deep plowing." Pet. App. 21. He stated the "crux of this case is that a farmer has plowed deeply to improve his farm property to permit farming of fruit crops

* * * more profitable than grazing" and that farmers have engaged in such agricultural pursuits "from the beginning of our nation, and indeed in colonial times." Pet. App. 18. In Judge Gould's view, the majority acted without clear Congressional direction in prohibiting "a traditional form of farming activity." Pet. App. 20, 22. He complained that the majority "makes new law by concluding that a plow is a point source and that deep ripping includes discharge of pollutants into protected waters," and that "the judicial determination that a deep plowing technique constitutes a pollution of navigable waters, with no prior adequate guidance from Congress, goes beyond mere statutory interpretation." According to Judge Gould, the majority's holding rests on "an agency power too unbounded or judicial law making, which is worse." Pet. App. 22.

SUMMARY OF ARGUMENT

I. The CWA authorizes the Corps to regulate under its Section 404 "dredge and fill" permitting program only those activities which produce a "discharge" defined as an "addition" of a "pollutant" (i.e., dredged spoil or fill material) from a "point source." These essential jurisdictional elements are absent in the case of plowing, regardless of its depth, because plowing breaks up, cuts, turns over and stirs native soil in place to prepare it for the planting of crops, and "adds" no materials to the soil. Because it involves no "addition," plowing never involves a regulated "discharge," as consistently recognized by the Corps' and EPA's regulations and by all relevant regulatory guidance until the December 1996 Field Memorandum, issued only after all plowing at issue here had ceased. Recent authority from the D.C. Circuit Court, which dissenting Judge Gould found persuasive, holds even *dredging activities* which add nothing but merely produce "incidental fallback" of already-present native materials back into the same general location do not produce "discharges." Plowing likewise moves soil in place, adding

nothing. Additionally, native soil turned in place is not a "pollutant," since it is naturally occurring in the same quantities and is not in any sense "waste."

Nor do *plows* dragged through the soil reasonably fall within the language of the statutory definition of "point source," because they are not "discernible, confined and discrete conveyances" of pollutants. Soil broken up, turned over and stirred by plows is moved in place, not "confined" or concentrated within any "pipe, ditch, channel, tunnel, conduit, * * * [or] container," through which it is gathered and "conveyed" to another location. Plows are not "conveyances" which carry and transport a farm's or ranch's valuable native topsoil to another location, either by design or effect. No prior case has ever held plowing alone to be a regulated activity or a plow to be a point source.

The CWA's text, structure and legislative history all confirm Congress intended to exclude agricultural sources of water pollution from section 404 regulation by treating them as "nonpoint" sources to be regulated through local management plans developed by the States. Congress' clear focus in enacting the 1972 CWA was to eliminate additions of untreated or inadequately treated waste and toxic pollutants from "end-of-pipe" sources, primarily inadequate municipal sewage treatment facilities and industrial plants, to our nation's waters as part of the waste treatment process.

II. Congress emphatically reaffirmed and clarified the existing exclusion of plowing from regulation in the 1977 CWA "farming exemption" amendments in Section 404(f)(1)(A). Following these amendments, Corps and EPA regulations continued to exclude plowing entirely from Section 404 regulation as an activity which "will never involve a discharge of dredged or fill material." The Corps' RGL 86-01 stated "plowing is not subject to any of the provisions of Section 404 including the Section 404(f) exemption limita-

tions," thus recognizing plowing could never be "recaptured" under Section 404(f)(2) based on any alleged effects on "waters."

The legislative history of the 1977 amendments confirms Congress never intended to regulate plowing under Section 404 and did not consider it to involve point source discharges. As to such activities, Congress' intent was to reaffirm their existing exclusion from regulation through an express statutory exemption, so as to avoid any possible confusion or future regulatory or judicial overreaching.

Even if plowing did involve a "discharge," it is exempt from regulation because the "normal farming" exemption applies and the "recapture" provision does not. The plain text of the recapture provision requires that significant navigable waters purposely be converted to uplands so as to support an otherwise exempt use to which they were not previously subject in their natural state. In other words, filling a previously unplowable swamp, marsh or bog so that it could *thereafter* be dry enough to be plowed and farmed would be a "recaptured" activity to which any alleged "discharges" from plowing would be merely "incidental." By contrast, plowing semi-arid ranchland already used to grow forage, which was always plowable and farmable in its natural state, to plant new higher-value crops, is a primary, traditional and normal farming and ranching activity. *Plowing alone*, like that engaged in here by Borden Ranch, is not merely "incidental" to some other activity whose purpose is to convert waters to an upland use to which they were not previously subject. The Corps' and Ninth Circuit's interpretation of the recapture provision to apply whenever plowing or other normal farming or ranching activity changes the hydrology of a wetland would effectively swallow the exemption enacted by Congress.

III. The Ninth Circuit majority erred in calculating the civil penalty by calculating each *pass* of the deep plow through "waters," rather than each *day* of plowing, as a separate violation unit for which the maximum penalty of "$25,000 per day of violation" could be imposed. 33 U.S.C. § 1319(d) contemplates maximum penalties will be calculated not in terms of the total number of individual violations of the same type or category, but in terms of *daily violation units*. Since Tsakopoulos' alleged violations here *all* fell into the same distinct category – "discharge" of native soil "fill" from a plow without a permit – the number of *daily* violations of this category should have been totaled and multiplied by $25,000 to reach the maximum penalty figure used as the starting point for downward adjustment. The Ninth Circuit's contrary approach violates the rule of lenity, is arbitrary and simply reads the "per day" language out of the statute based on supposed "policy" goals which are inapposite to this context, in which Mr. Tsakopoulos' violations of the Act's strict liability scheme were neither alleged by the government nor found by the district court to be intentional.

ARGUMENT

I. DEEP PLOWING DOES NOT INVOLVE A "DISCHARGE" OR "ADDITION" OF "POLLUTANTS" FROM A "POINT SOURCE" AND IS THEREFORE NOT SUBJECT TO REGULATION UNDER CWA SECTION 404.

The Ninth Circuit erred when it held that deep plowing involves a "discharge" that "adds" pollutants from a "point source" and thus requires a "dredge and fill" permit from the Corps. Deep plowing neither "adds" materials to a wetland under any reasonable interpretation of that word, nor are plows in any of their varieties "point sources" which "confine," carry or "convey" "pollutants" from one location to another in the manner of a pipe, ditch or container. Native

farm soil plowed to plant crops is not waste and, hence, not a "pollutant." The text, structure and legislative history of the Act show Congress purposely excluded agricultural activities as a class from Section 404's regulation of "point sources" of pollutants, and assigned to the States and their local agencies primary responsibility for identifying, studying, planning, and regulating with respect to such traditionally local land use matters.

A. Plowing Does Not Constitute An "Addition" Of A "Pollutant" Under The Plain Language of the CWA.

"Section 404(a) grants the Corps authority to issue permits 'for the discharge of dredged or fill material into the navigable waters at specified disposal sites.'" *SWANCC*, 531 U.S. at 163; Pet. App. 210. "Discharge" or "discharge of pollutants" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12), (16). Pet. App. 212, 213.

The Ninth Circuit opinion concedes that "no new material [is] 'added'" to waters by deep plowing, yet holds that a "pollutant" is nevertheless added because underlying "soil was wrenched up, moved around, and redeposited somewhere else." Pet. App. 8. In other words, *plowing* occurred.

Unlike regulated "point source" discharges, plowing does not extract, hold, confine, collect or remove native materials and then "redeposit" them. Not even "incidental fallback," held not to be a regulable discharge in *National Mining*, occurs during plowing, since the plowed soil never loses contact with the immediately-surrounding ground. Plows cut through, break up and turn soil in place while adding nothing and redepositing nothing.[12]

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[12] As Judge Gould stated, "[b]ecause deep ripping does not move any material to a substantially different geographic location and does not process such material for any period of time, *Rybachek* is

The Ninth Circuit's decision also conflicts with applicable Corps and EPA regulations. "Fill material," as the applicable regulations and common sense suggest, is material moved in quantities to create dry land, fill a hole, build a structure, or the like. 33 C.F.R. §323.2(e),(f). Any incidental movement of soil during plowing simply does not fit this language, as explicitly acknowledged by the Corps' and EPA's regulations stating that plowing "will never involve a discharge of dredged or fill material." 33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4); Pet. App. 216, 218. Previously, in *Resource Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d at 1168 (9th Cir. 1998), the Ninth Circuit held that a solid waste landfill leak detection and collection system placed in wetlands did not constitute "fill material" because its "primary purpose" was not to replace an aquatic area with dry land or change the bottom elevation of a water body. See also *National Mining*, 145 F.3d at 1401, fn. 1 (noting "primary purpose" requirement for defining "fill material").[13] Under a "primary purpose" test, deep plowing does not produce "fill material" where its purpose is to enhance and revitalize soil for planting new crops, as here.

The reasoning of *National Mining* is persuasive on the "addition" requirement. The D.C. Circuit there invalidated the

not controlling." Pet. App. 20. Judge Gould recognized *National Mining* could not be distinguished and was persuasive on the "addition" issue because plowing produces, at most, "incidental fallback" of native soil which cannot be held to be a "discharge."

[13] Subsequent to the Ninth Circuit's decision, the Corps revised its regulations defining "fill material" to eliminate the "primary purpose" requirement. See 67 Fed. Reg. 31129 (May 9, 2002), amending 33 C.F.R. § 323.2(e). The new regulations are obviously inapplicable to this case. They are also inconsistent with the express "purpose" requirement of the CWA's "recapture provision." *See* 33 U.S.C. § 1344(f)(2) (recapture applies where purpose of activity is converting wetland to use to which it was not previously subject). In any event, even under the new rule, plowing would not be regulated because it does not "discharge" a pollutant and does not "replace" navigable waters.

Corps' and EPA's so-called "*Tulloch* Rule," purporting to regulate any redeposit from any excavation activities, and held: (1) "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back," *National Mining*, 145 F.3d at 1404; and (2) such "incidental fallback" (which occurs when material is dredged from a water, and some of it falls back off the dredge bucket into the same general location) is not a regulated "discharge." *Id.* at 1403. *National Mining* distinguished *Rybachek*, 904 F.2d 1276 – which it found was "the strongest authority for the agencies' position," *National Mining*, 145 F.3d at 1406 – as involving a regulable discharge which was the "discrete act of dumping leftover material into the stream after it had been processed" rather than the "incidental fallback of dirt and gravel" to its original location. *Id.*, at 1406. The statute's use of the word "addition," as well as the phrase "specified disposal sites," shows "that Congress had in mind either a temporal or geographic separation between excavation and disposal which simply does not fit incidental fallback." *Id.*, at 1410, Silberman, J., concurring.

Not only does deep plowing "add" nothing, but the soil it moves in place is not a "pollutant" under the plain language of 33 U.S.C. § 1362(6), Pet. App. 211. Productive soil is obviously not "dredged spoil, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt," or "industrial or municipal waste." It is not "biological materials" within any normal or reasonable construction of that phrase, since it is not the "waste material of a human or industrial process." See *Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources, Inc.*, __ F.3d __, 2002 WL 1792498, *6 (9th Cir. 2002) (opn. by Gould, J.) (applying doctrine of *ejusdem generis* and analyzing purpose of CWA in holding that the term "pollut-

ant" does not encompass naturally occurring biological matter such as shellfish chemicals, shells and feces emitted from mussel harvesting raft). Native soil turned in place by plowing is not "solid waste" or "agricultural waste," either, because native topsoil is not *waste* at all, but, rather, a valuable natural resource which is enhanced and revitalized for use in growing crops, not discarded, by plowing.

In short, under the statute's plain text requiring an "addition" of a "pollutant," deep plowing is not a "discharge" subject to Section 404's permit requirements. There can be no "addition" of "pollutants" from an activity where there is no "addition" of material. Plowing does not add new materials or "pollutants," but merely cuts, breaks up and turns over existing soil in place to prepare it for the planting of crops.

B. Plows Are Not CWA-Regulated "Point Sources."

Another essential element of Section 404 permitting jurisdiction is that the "pollutant" must be "added" from a "point source," defined as "any discernible, confined and discrete conveyance." Pet. App. 212. This statutory definition "evoke[s] images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 646 (2d Cir. 1993). A plow is not a "point source" since it is neither "confined" nor a "container," nor does it function as a "conduit" or "conveyance" of pollutants/materials from one location to another. No prior case has ever held a plow is a "point source," and there are no agency regulations supporting the treatment of plows as point sources.

The plain language of the statute defining "point source" provides numerous illustrative examples, but plows are neither described nor listed in the statute, nor are they similar in

any significant respects to the numerous examples listed.[14] Plows lack the defining characteristics of any "discernible, confined and discrete conveyance" such as a "pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The common characteristic present in *all* of these types of statutorily-listed "point sources" – and lacking in plows – is their ability to *confine*, *contain* and *concentrate*, and then to *carry* and *convey* – as a conduit – pollutants from one discrete location to another. Plows are not *ejusdem generis*[15] with the enumerated examples of a "confined and discrete conveyance." Plows break up, cut, stir and turn soil in place – they do *not* confine, con-

[14] Given Congress' concern for and intimate familiarity with agricultural activities, and its careful treatment of the same in the CWA, it is inconceivable that Congress would not have expressly included "plows" among the illustrative examples of "point sources" listed in 33 U.S.C. § 1362(14), either in 1972, 1977 or thereafter, had it actually intended to regulate them as such. Regulation of non-point source pollution is left primarily to the States. E.g., 33 U.S.C. § 1288(b)(2)(F); see S. Rep. No. 95-370, at 76 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4401 (normal farming activities to be regulated as non-point sources by State and local agencies).

[15] "Of the same kind, class, or nature." Black's Law Dictionary (1979 ed.), p. 464. "Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991). "It is a well-settled principle of statutory construction that where specific words precede or follow general words in an enumeration describing a particular subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the specific words." *Trinity Services, Inc. v. Marshall*, 593 F.2d 1250, 1258 (D.C. Cir. 1978), and authorities cited; *see also Association to Protect Hammersley, etc.*, 2002 WL at *6 (9th Cir. 2002) (applying *ejusdem generis* doctrine to CWA's statutory definition of "pollutant").

tain, carry and convey it, in the fashion of a shovel, bucket, backhoe, grading blade, or other "confined conveyance."

Moreover – and setting aside for the moment the express statutory exemption for plowing in Section 404(f)(1)(A) – it would make little sense to hold Congress intended to include plows, *sub silentio*, in the definition of "point source" while expressly exempting "agricultural stormwater discharges and return flows from irrigated agriculture." § 1362(14). To regulate supposed individual "discharges" from instances of plowing as "point source" discharges, while broadly exempting all discharges constituting the "runoff" from all plowed fields would be the height of irrationality. Where construction of a statute would not only contravene its plain language and defy common sense, but would lead to absurd and irrational results, the Court should reject it. *Griffen v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.")

The Ninth Circuit's reliance on a Fifth Circuit case finding "*bulldozers* and *backhoes*" *may* constitute "point sources" is misplaced. In *Avoyelles*, bulldozers and backhoes were not used for plowing but for major earthmoving, excavation and ditching functions. 715 F.2d at 901, 920-921, 926-927.[16] The bulldozers and tractors (not backhoes) pulling deep plows on the semi-arid Borden Ranch were indisputably not engaged in grading, excavation or ditching, but were simply using their motive power, as horses and oxen did in earlier times, to drag normal farming implements – deep

[16] In *Avoyelles*, the owner of a 20,000-acre tract leveled the property, cut down timber and vegetation with bulldozers with shearing blades, pushed, burned, raked and disked all these materials into the land's low spots to raise and level it, and further dug a drainage ditch, for the express purpose of filling and drying out a swampy Louisiana flood plain so that, thus altered from its natural state, it could *thereafter* be plowed and farmed for soybeans.

plow shanks – through the soil to break it up, and turn it in place, i.e., *to plow* to prepare for crops. 33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4). Neither *Avoyelles* nor any other reported decision,[17] until *Borden Ranch*, has held that plowing alone produces a "point source" discharge.[18]

C. The Text, Structure, And Legislative History Of The CWA Confirm That Congress Intentionally Excluded Agriculture From Section 404 Regulation.

Section 101(b) of the CWA states:

> "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of

[17] *United States v. Akers*, 785 F.2d 814, 816-817 (9th Cir. 1986) involved "extensive [dike building], grading, leveling, drainage and water diversion to convert [2,889 acres of] wetlands to farmland suitable for growing upland crops." The Ninth Circuit there refused to endorse the government's extreme argument that "discing of soil" considered in isolation was a "point source" discharge. *Id.* at 819-820 (holding farmer exemptions inapplicable because court "cannot view Akers' plowing, discing and seeding in isolation" from the other activities). See also *In re Alameda County Assessor's Parcel*, 672 F.Supp. 1278, 1281 (N.D. Cal. 1987) ("graders and a bulldozer" used "to spread earthen fill * * * brought onto the property and dumped from large earth-moving trailer trucks"); *United States v. Larkins*, 657 F.Supp. 76, 85 (W.D. Ky. 1987) ("use of earthmoving equipment to construct earthen dikes and levees on wetlands"); *United States v. Larkins*, 852 F.2d 189, 190 (6th Cir. 1988) (defendants "dug drainage ditches, cut timber, blasted beaver dams, and began filling low spots" on 10-12 acres covered with knee deep water).

[18] The issue is critical to the nation's farmers and not limited to deep plowing, as the agencies are now going beyond even their own unauthorized December 1996 Field Memorandum and attempting to regulate even the shallowest forms of plowing – including disking – under the authority of the *Borden Ranch* decision. See, e.g., Pet. App. 41, 48 (district court summary judgment order finds both deep ripping and *disking* are regulated).

> States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. * * *"

33 U.S.C. § 1251(b); see Vol. 1, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (hereafter "1972 LEG. HIST.") at 3, 765.

In addition to its provisions regulating "point source" discharges through "command and control"-type permitting requirements, the CWA directs the States to identify areas with substantial water quality control problems and to develop corresponding area-wide waste treatment management plans. 33 U.S.C. § 1288(a),(b); 1 1972 LEG. HIST. 26-27. Such plans must, *inter alia*, include "a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288(b)(2)(F); see 1 1972 LEG. HIST. 28.[19] The Administrator's role under Section 304(e) was limited, in relevant part, to issuing "information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from – (A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands." 33 U.S.C. § 1314(f)(A); 1 1972 LEG. HIST. 38.

As summarized by one commentator, the CWA leaves regulation of "nonpoint source pollution" primarily to the

[19] The phrase "return flows from irrigated agriculture, and their cumulative effects," was added as part of the 1977 CWA amendments. Pub. L. 95-217, § 33(a).

States, and "most pollution produced by agricultural activities comes from nonpoint sources." Gerald A. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. Davis l. Rev. 461, 462 (1990). Congress recognized the problem of agricultural pollution, but "chose to address [such] nonpoint source pollution primarily through the Section 208 planning process." *Ibid.* See also 1 1972 LEG. HIST. 354 (Rep. Blatnik remarks re "agriculture and nonpoint sources of discharge"); 430 (Rep. Cleveland remarks that CWA does not prohibit agricultural runoff pollution); 645 (colloquy between Reps. Henderson and Wright that "point source" definition covers "only those concentrated animal feeding operations which would collect and concentrate waste for discharge through a definite point source outlet").

The 1972 CWA focused on municipal and industrial "point source" discharges and excluded agriculture from this category. See *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d at 646-647, and numerous statutes and authorities cited therein. The "singlemost" and "most widespread and acute" problem addressed by the CWA was "inadequate municipal sewage treatment." 1 1972 LEG. HIST. 97 (Rep. Jones). Foremost was the goal of eliminating "discharges" of pollutants to navigable waters by 1985, and providing needed municipal waste treatment facilities such that "streams and rivers are no longer to be considered part of the waste treatment process." 1 1972 LEG. HIST. 120-121 (Sen. Muskie); see *id.* at 132 ("Congress has said that it wants to see the end of community and industrial discharges by 1985") (Sen. Williams).

To achieve its goals of eliminating discharges of waste and toxic pollution from community and industrial point sources, while leaving nonpoint source agricultural activities for further study and state regulation, Congress employed the specific terms discussed and analyzed above – "discharge,"

"addition" and "point source" – which have specific meanings. As remarked by primary CWA sponsor Senator Muskie: "The term 'discharge' is a word of art in the legislation. It refers to the actual discharge from a point source into the navigable waters, territorial seas or the oceans." 1 1972 LEG. HIST. 178; see also *id.* at 762-763 (Rep. Blatnik House Committee on Public Works Report emphasizing importance of CWA's definitional terms such as "discharge of a pollutant" and "point source" which "have very specific and technical meanings"); *id.* at 812. "Point sources" were envisioned by Congress as affecting "a given stretch of water" (*id.* at 246) (Rep. Harsha remarks on House Consideration of Conference Committee Report), and being subject to "effluent limitations" made on the "basis of classes and categories of point sources, as distinguished from a plant-by-plant determination." *Id.* at 254 (Rep. Dingell, quoting Conference Report at p. 121); *id.* at 789-791, 798 (referring to application of "best practicable control technology" to industrial "end of the pipe" point sources).

As stated by Senator Dole: "Most sources of agricultural pollutants are generally considered to be nonpoint sources." 2 1972 LEG. HIST. 1298. Numerous Legislators, including Senator Muskie, unanimously stated their views that the CWA does not regulate agricultural activities as "point source" discharges subject to the Act's permitting requirements. *Id.* at 1254 ("The bill also requires the Administrator to conduct research into better methods of controlling pollutants from nonpoint sources such as agricultural runoff") (Sen. Muskie); 1275 ("I think we all recognize that the characteristics of agricultural pollution and the best means of controlling it are quite different from those associated with urban/industrial pollution. Several portions of this bill apply specifically to the control of pollutants from nonpoint agricultural sources," citing research and planning provisions of CWA §§ 104(d)(1)(b), 105, 105(d) and 304(e)) (Sen. Eagleton); 1276 (reference to "nonpoint sources, including agri-

cultural activities") (Sen. Eagleton); 1294 (agricultural pollution problems involve "nonpoint sources"; "nonpoint source of pollution is one that does not confine its polluting discharge to one fairly specific location, such as a sewer pipe, a drainage ditch, or a conduit") (Sen. Dole); 1314 (in discussing limited scope of CWA, Sen. Muskie comments that effective technology is lacking to deal with nonpoint source problems such as agricultural runoff, control of which would involve land use controls); 1470 (Report of Senate Comm. On Pub. Works No. 92-414, accompanying S. 2770 discussing agriculture generally as nonpoint source); 1513-1514 (supplemental views of Sen. Dole to same effect).

While the plain meanings of the terms "discharge," "addition" and "point source" as set forth and defined in the text of the CWA compel the conclusion that plowing does not produce a "point source" discharge regulated under Section 404, that conclusion is also inescapable from a review of those terms in the context of the structure and legislative history of the 1972 CWA discussed above. This conclusion is further buttressed by the later 1977 CWA amendments and their legislative history.

II. THE CWA'S "FARMING EXEMPTIONS" REAFFIRMED THE EXISTING EXCLUSION OF "NORMAL FARMING * * * AND RANCHING ACTIVITIES SUCH AS PLOWING" FROM SECTION 404 REGULATION.

It is unnecessary to reach the issue of interpretation of the CWA's farming exemptions to decide this case in petitioners' favor if the Court concludes that deep plowing produces no regulated point source "discharge" of "pollutants" so as to fall under the Corps' Section 404 permitting jurisdiction. However, the plain language of Section 404(f), the agencies' own regulations and guidance, and the relevant legislative history all powerfully reaffirm the conclusion that Congress

never intended to regulate plowing as a point source discharge under Section 404.

A. The Plain Language of Section 404(f)(1)(A) Broadly Exempts The Plowing Of Farmland or Ranchland to Plant Crops From Section 404 Regulation.

Congress' 1977 amendments were intended to prevent regulatory overreaching and make clear that no permit is required for any alleged "discharge"

> from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.

33 U.S.C. § 1344(f)(1)(A); Pet. App. 210. By use of the phrase "such as" in the statute, Congress has defined "plowing" as a "normal farming * * * and ranching activity." [20] This broad exemption clearly shows "that Congress emphatically did not want the law to impede these bucolic pursuits." *National Mining*, 145 F.3d at 1405.

Congress provided a facially narrow "recapture" provision removing from the exemption:

> Any discharge of dredged or fill material into the navigable waters *incidental* to any activity having as its ***purpose*** *bringing an area of the navigable waters into a use to which it was not previously subject*, ***where*** the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.

[20] Where, as here, Congress has already directly spoken to the topic by specifically defining statutory terms, such as "normal," conflicting regulatory definitions of the same term are not accorded *Chevron* deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984).

33 U.S.C. § 1344(f)(2); Pet. App. 211, emph. added. On its face, this exception is not concerned with activities – like like plowing productive farm or ranch land – that do *not* produce discharges. Nor does it address a change from one agricultural crop to another, like the change here from pasture and forage crop to orchard/vineyard crop. Rather, it addresses *intentional conversion of unproductive wetlands to drylands on a significant scale so as to enable* normal farming activities *which could not otherwise occur*. *In re Carsten*, 211 B.R. 719, 735 (Bkrtcy. D. Mont. 1997) (recapture provision addresses extensive conversion of unproductive wetlands to drylands on significant scale, not minor conversions of small areas of marginal waters to uplands).

Thus, where activities are done for the primary purpose of draining and drying out significant water bodies to convert them to uplands capable of being farmed – i.e., the *Avoyelles* situation – the exemption cannot be claimed on the grounds that otherwise unregulated farming activities, such as plowing, are later performed "incidental to," i.e., as a "minor concomitant," American Heritage Dictionary Of The English Language, New College Ed. (1975), p. 665, of the primary conversion project. This interpretation is compelled by the plain language of the "farming exemptions," Congress' intent to meaningfully exempt normal farming activities from onerous federal regulation under the CWA's "point source" program, and related statutes.[21]

[21] Congress subsequently enacted so-called "Swampbuster" provisions in the 1985 Food Security Act ("FSA"). 16 U.S.C. §§ 3821-23; Pub. L. 99-198, 99 Stat. 1507. Under the FSA "there will be liability for conversion of a wetland *if it is manipulated 'for the purpose or to have the effect of' making the land farmable." Downer v. U.S. By And Through Dept. of Agriculture,* 894 F.Supp. 1348, 1356 (D.S.D. 1995), emph. added, aff'd 97 F.3d 999 (8th Cir.); see 16 U.S.C. § 3821(c) (listing "draining, dredging, filling, leveling" – but not "plowing" – as wetland conversion activities). Statutes *in pari materia* are construed together. *Erlenbaugh v.*

The Ninth Circuit held petitioners' deep plowing ranch land used to grow forage to plant vineyards and orchards instead was not exempt and was "recaptured" because "[c]onverting ranch land to orchards and vineyards is clearly bringing the land 'into a use to which it was not previously subject.'" Pet. App. 10. But the statute does not refer to *any* "new use." The recapture provision's first prong is satisfied where a discharge is "incidental" to an activity "having as its purpose bringing an area of the **navigable waters** into a use **to which it was not previously subject**," 33 U.S.C. § 1344(f)(2). Whether an area of "waters" is "subject" to plowing and upland farming use prior to purposeful conversion activities obviously depends on how wet it is and for how long per growing season. Because of its natural character, land may be readily "subject" to agricultural use without ever having been actually subjected to such use. For example, land containing soils classed as prime farmland, which becomes paved over with a shopping mall, may well have previously been "subject" to farming use, even though such use never occurred, i.e., the land was not previously "subjected" to such use. Likewise, one may be "subject" to the laws of the land, or to the criticism of others, while never having actually been "subjected" to either prosecution under the laws or criticized by peers. By "previously subject" to, Congress clearly meant previously capable of or amenable to a use in its natural condition.

United States, 409 U.S. 239, 243 (1972); 2B Norman J. Singer, Sutherland Statutory Construction § 51.02 (6th ed. 2000). "Wetlands" subject to being farmed by use of "normal cropping or ranching practices" (i.e., plowing) as a result of their "natural condition" (e.g., drought or, as here, regular dryness in a semi-arid region throughout the long growing season) are *not* deemed converted (i.e., brought into a use to which they were not already subject) when so farmed. 16 U.S.C. § 3822(b). Accordingly, *merely* plowing (without more) triggers neither FSA farm subsidy ineligibility under "Swampbuster" *nor* CWA Section 404's recapture provision.

In addition, and contrary to the statutory language, the court treated as an independent reason for recapture that plowing activity altered the hydrology of a wetland. Pet. App. 10. On that reasoning, *any* change in agricultural crop or practice – even plowing crop land to lie fallow – would bring any kind of plowing within federal regulation. CWA Section 404's exemption for plowing, Pet. App. 218, would be rendered virtually meaningless as a practical matter. As observed by one commentor:

> The § 404(f)(2) recapture provision must be given a reasonable reading or it would swallow the exemptions. Any of the exempted activities impair the waters to a degree, but the government does not require a permit for those exempt activities that result in minor impacts to the nation's waters, including wetlands.
>
> Margaret N. Strand, *Federal Wetlands Law, Part I, The Clean Water Act § 404 Program*, 23 Envtl. L. Rep. 10185, 10209 (1993).

The Corps and the Ninth Circuit effectively treat Section 404(f)(1) as a mere "grandfather" clause and assume Congress meant to regulate under Section 404 all farming activities except those already being conducted in the very same manner currently or in the recent past. Under this erroneous view, the exemptions would not apply at all to plowing historically ranched land for the first time either to improve the forage (because plowing changes hydrology) or to plant non-forage crops (because that is a change in use). This makes no sense because the statute's plain language tells us that by definition the *plowing of ranchland to plant crops* is, in the eyes of Congress, a normal farming and ranching activity which is exempt from Section 404 regulation. See § 1344(f)(1)(A) (referring to "normal farming * * * and ranching activities such as plowing * * * for the production

of food, fiber"). To hold that the *very activity* addressed and *defined* by the statute itself *as* a normal agricultural activity – plowing ranchland to plant crops – is *never* "normal" nor exempt flies in the face of the exemption's plain meaning.

B. The Legislative History Confirms Congress Intended To Clarify The Existing Exclusion of Plowing Under Section 404.

The CWA's legislative history refutes the Ninth Circuit's crabbed interpretation of the "farming exemptions," showing that Congress did not newly exempt plowing from statutory regulation mid-course, but that it never intended to regulate mere plowing at all under the CWA. Senator Muskie, a primary CWA sponsor, *Avoyelles*, 715 F.2d at 915, explained that the 1977 amendments "tr[y] to *free from* ***the threat of regulation*** those kinds of man made activities which are sufficiently *de minimis* as to merit general attention at the state and local level and little or no attention at the national level." Vol. 3, "A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977" (1978) (hereafter "1977 LEG. HIST.") at 645 (CR36, ER489) (Senate Report on S. 1952, 95th Cong.), emph added; *see also id.* (Vol. 4) at 924 (ER 492) (Sen. Domenici); 181 (ER482) (President's comments); 289, 351, 524 (ER481, 483, 487) (Sen. Stafford). Where, as here, plowing is a permitted farming activity under locally-enacted agricultural zoning and other State and local regulations, Congress intended the federal government to have no permitting role under the CWA.

Senator Muskie recognized the 1972 CWA's basic objective was "to eliminate toxic pollutants in toxic amounts" from the nation's waters, *id.*, 426, ER484, and stated of the "farming exemptions":

> The conferees agree to adopt *the Senate amendment that* ***legislatively clarifies the exclusion of certain activities that do not typically involve point source discharges of dredged or fill material*** * * * *The conferees have adopted the Senate's explicit approach for* ***clarifying that plowing, seeding, cultivating, harvesting,*** *minor drainage, and soil and water conservation practices performed on uplands* ***were not intended to require section 404 permits. Such exemptions were provided by the Corps of Engineers' regulations under the current law.*** *[¶]* * * * *While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.*

ER485, emph. added; 3 1977 LEG. HIST. 475; *see also* 4 1977 LEG. HIST. at pp. 919-920 (ER490-491) (Chafee comments); see ER495, 494, 494. The legislative history clearly shows Congress never intended to regulate pure plowing under the CWA and never even considered it to produce "discharges."

The Corps asserts, Opp. Br. at 13, that Congress would not have expressly exempted plowing and other normal farming activities in the 1977 CWA amendments unless it believed such activities produced point source "discharges" which were otherwise within the scope of Section 404.[22] Yet, as amply illustrated by the *National Mining* court's pointed rejection of this position, 145 F.3d at 1405, and by Senator Muskie's above-quoted comments, Congress not uncommonly takes a "belt and suspenders" approach to clari-

[22] This argument plays "ostrich to the substantial history behind the amendment," ignoring that "it is not 'pointless' to adopt a clarifying amendment in order to eliminate opposition to a bill," or, indeed, in any circumstances where legislators believe clarification is necessary because of the risk of regulatory misinterpretation. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 128 (dis. opn. of STEVENS, J.).

fying exclusions to reassure particular constituencies and prevent regulatory overreaching.[23]

Moreover, the Legislative history suggests that whatever Congress' view with respect to whether *other* expressly exempted activities – such as dam, levee and bridge maintenance (§ 1344(f)(1)(B)), stock pond and irrigation ditch construction or maintenance (§ 1344(f)(1)(c)) – actually produced "discharges," it never believed that the normal farming activities listed in Section 404(f)(1)(A) did so. Rather, in endorsing the substance of Senator Muskie's above-quoted comments, other Legislators confirmed that the normal farming amendment legislatively clarified *an existing exclusion* from the Act. As echoed by Rep. Hammerschmidt:

> On the positive side, we will now have for the first time *statutory recognition* that normal farming, ranching and silviculture activities do not belong in this [Section 404] permit program. These exemptions *reemphasize* that *Congress never intended these activities to be considered discharges of dredged or fill material.*

33 1977 LEG. HIST. 351, emph. added. *See also, id.* at 348 (Corps' pre-existing regulations also made clear "that plowing, seeding, cultivating, and harvesting for the production of food, fiber, and forest products are not included in the Section 404 program") (Rep. Roberts); 420 (amendments clarified that plowing and other normal farming activities did not involve point source discharges and "were not intended to require Section 404 permits") (Rep. Harsha); 485 (conferees agreed to adopt exemptions "to prevent over-regulation of activities that have little or no effect on the aquatic environment. The bill includes the clarification that permits are not required for certain normal farming activities such as plowing and seeding which are not discharges of dredged or fill material") (Sen. Stafford); 524 ("Senate amendment to Section 404 * * * clarifies the exclusion of activities that do not involve point source discharges, such as plowing and upland conservation activities") (Sen. Baker); 529 (exemption "legislatively clarifies the exclusion of certain activities that do not involve point source discharge" and that "normal farming, ranching and silvicultural activities such as plowing * * * were not intended to require 404 permits") (Sen. Wallop); 644, 869 (normal farming and similar activities "should not and cannot be regulated by the Federal Government") (Sen. Muskie); 911 ("plowing" is among the exempt "earth moving activities that do not involve discharges of dredged or fill materials into navigable waters") (Sen. Stafford); 924 (Congress "never intended under Section 404 that the Corps of Engineers be involved in the daily lives of our farmers, realtors, people involved in forestry, anyone that is moving a little bit of earth anywhere in this country that might have an impact on navigable streams. We just did not intend that") (Sen. Domenici).

This understanding of Congress' intent underlying the Section 404(f)(1)(A) "farming exemptions" – as clarifying certain activities' non-regulated status – is explicitly confirmed in colorful language by one scholar otherwise critical of this Court's analysis of CWA *geographic* jurisdiction:

> In addition to stock and farm ponds, irrigation ditches, and temporary sedimentation ponds * * * § 404(f) also

[23] For example, as noted by Representative Roberts: "Section 33 of the conference report exempts return flows from irrigated agriculture from all permit requirements under section 402 **and** recognizes that this activity is not a point source within the meaning of the [CWA]." 3 1977 LEG. HIST. 318, emph. added. Since, as with Section 404, Section 402 requirements apply only to point source discharges, under the government's argument it would be redundant to both define "point source" to exclude irrigation return flows **and also** provide an express Section 402 permit exemption. Yet that is the approach Congress took. *See* 33 U.S.C. §§ 1342(a), (l)(1), 1362(14).

exempts a number of activities that apparently have nothing to do with water at all. Why would Congress exempt them from § 404's requirement for a permit to discharge into navigable waters, however defined? The legislative history indicates that Congress may have wished to exclude certain activities from § 404 in specific terms to reassure particular constituencies even when it was otherwise clear that § 404 would not reach those activities. For example, the House bill to amend § 404 * * * exempted normal farming, silviculture, and ranching activities * * *, activities that clearly would not have been subject to the jurisdiction of the section in any case. * * * In other words, in the House at least, one stake through the heart of the vampire was not considered enough.

William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 Envtl. L. Rep. 10741, 10755 (2001), fns. omitted.

Nor does the legislative history, fairly read, support the extremely narrow reading of the farming exemptions and broad reading of the recapture clause espoused by the Corps. In responding to Senator Dole's concerns on behalf of his agricultural constituents regarding whether minor drainage and filling activities by farmers on low-lying areas to improve crop production would require a Section 404 permit, Senator Muskie answered in the negative, stating:

> Mr. President, the drainage exemption is very clearly intended to put to rest, once and for all, the fears that permits are required for draining poorly drained farm or forest land, of which millions of acres exist. No permits are required for such drainage. **Permits are required only where ditches or channels are dredged in a swamp, marsh, bog, or other truly aquatic area**. * * * The Corps[']definition requires a

> prevalence of aquatic vegetation and is intended to describe only the true swamps and marshes that are part of the aquatic ecosystem [¶] **The type of drainage you have described in many cases would not require a permit since the drainage could be performed without discharging dredged or fill material in water, or would occur in areas that are not true marshes or swamps intended to be protected by Section 404**.

4 1977 LEG. HIST. 1042-1043 (Sen. Muskie), emph. added.

It has not escaped some scholars' attention that this legislative history has either been ignored or misconstrued by those courts which have in *dicta* "narrowed" the exemption:

> The remarks quoted by the Court **appear to enlarge the exemption rather than narrow it**. Senator Muskie specifically stated several times that Section 404 jurisdiction was intended to apply only to true swamps and marshes. **His comments, which were intended to placate Senator Dole, imply that normal farming operations were not intended to be curtailed in the extensive fashion that has evolved from the application of the CWA**.

Larry R. Bianucci & Rew R. Goodenow, *The Impact of Section 404 of the Clean Water Act on Agricultural Land Use*, 10 U.C.L.A. J. Envtl. L. & Pol'y 41, 58-59 (1991), emph. added.

Requiring a farmer to undergo the far-reaching CWA Section 404 permitting process in order to plow his or her land for a new crop would entail significant burdens. Permits require a "public interest review" as set forth in 33 C.F.R. § 320.4(a), which involves a "careful weighing" by the Corps of general environmental concerns, wildlife values, land use,

water quality, food and fiber production, considerations of property ownership, and a host of others. The farmer or rancher regulated under Section 404 would be required to engage in a lengthy and costly permitting process, hiring of experts and filing of detailed documents, so that the Corps can conduct what is essentially general land use regulation and management. Virginia Albrecht and Bernard Goode, Wetland Regulation in the Real World (1994), document lengthy delays in processing Section 404 applications, observing that only 30% of permit applications are ultimately approved. Most applications (63% in Albrecht & Goode's study) are withdrawn, usually because the Corps makes demands that the applicant cannot or does not want to comply with. Congress plainly intended that farmers and ranchers engaged in normal farming activities not be subjected to such burdens simply in order to make normal productive use of their land.

C. The Agencies' Regulations Treat Plowing As A "Non-Discharge" Excluded Entirely From Section 404's Provisions, Including The "Recapture Provision."

The implementing agency regulations defining "plowing" expressly exclude *all* plowing from CWA regulation. 33 C.F.R. Section 323.2(f), for example, provides "fill" is *addition* of material and *never* includes plowing. The Corps' regulations provide:

> *Plowing means* ***all forms of primary tillage****, including moldboard,* ***chisel****, or wide-blade plowing, discing,* ***harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. * * * Plowing as described above will never involve a discharge of dredged or fill material.***

Pet. App. 216, emph. added; see Pet. App. 218 (parallel EPA regulation).[24]

The regulations clarifying that plowing does not involve a discharge, and is therefore excluded from Section 404 regulation, have been in effect continuously both prior to and after the 1977 "farming exemption" amendments. See pp. 4-6, *supra*. RGL No. 86-01, issued February 11, 1986 by the Corps, and entitled "Exemptions to CWA – Plowing," states in pertinent part:

> Plowing for the purpose of producing food, fiber, and forest products and meeting the definition in Section 323.4 will never involve a discharge of

[24] The regulations also state that "plowing" "does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetlands is not plowing." *Ibid.* On its face, this language appears designed merely to distinguish grading, blading and other non-exempt purposeful wetlands conversion activities from true plowing to prepare land for crops, and to clarify that the definition of plowing does not encompass such disparate earth-moving activities. To the extent the Government misreads the language of its regulation to suggest that any form of plowing used on farm or ranch land to break up, cut, turn over and stir the soil to prepare it for crops could *also* constitute the non-exempt "redistribution of surface materials * * * by other means to fill in wetlands," the suggestion renders the regulatory definition hopelessly contradictory and unintelligible. Such a position would mean that even plowing *as defined* in 33 C.F.R. § 323.2(a)(1)(iii)(D) will involve a discharge, depending on its effects on wetlands – a notion which directly conflicts with the regulation's concluding statement that "Plowing as described above will **never** involve a discharge." The "redistribution" language is not entitled to *Chevron* deference for at least two other reasons: (1) plowing produces no "addition" from a "point source," and is by statute a non-regulated activity for that reason; and (2) Congress has already spoken to the topic in the statute and legislative history exempting plowing.

dredged or fill material. Such plowing is not subject to any of the provisions of Section 404 including the Section 404(f) exemption limitations. Section 404(f) is applicable to those activities that do involve a discharge but are statutorily exempted from the need to obtain a 404 permit.

The Corps' longstanding view as expressed in its regulations and RGL 86-01 was absolutely correct. Pure plowing, as properly defined to include any form of primary tillage done to prepare soil for the planting of crops, was excluded from Section 404 regulation from the very beginning. The express exemption in the 1977 statutory amendments served merely to emphatically reaffirm that existing exclusion in order to prevent any possible regulatory overreaching.

The December 12, 1996 Field Memorandum – issued some 10 years after RGL 86-01, almost 20 years after Congress' 1977 CWA amendments, and more than 20 years after the Corps' first regulations exempting plowing – is not only in direct conflict with the statute, and the Corps' own regulations and prior guidance on plowing, but as already noted, was issued only *after* completion of all plowing for which the district court found violations in this case.[25]

[25] The belated and unsupported 1996 memo, by which the Corps and EPA purported to abruptly reverse their previous position on plowing with no relevant statutory or regulatory change, was merely an attempted *ex post facto* justification for the agencies' unjustified treatment of Tsakopoulos and Borden Ranch for the previous three years. The Memo was issued without legal justification, without adequate empirical study or support, and without notice and comment rule making procedures – like a desperate act seeking to justify the actions of a rogue policeman who has already arrested someone for the supposed violation of a non-existent law. "[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines * * * do not warrant *Chevron*-style deference," but are entitled to any respect commanded by their "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). No such respect is due here, where the agencies' about-face conflicts with the plain statutory language and legislative history and impinges on traditional state powers.

D. Expanding Section 404 To Cover Deep Plowing For Crop Production Is Contrary To Congress' Explicit Purpose to Preserve And Protect The Primary Responsibilities Of States Over Land Use.

As this Court recently recognized in *SWANCC*, 531 U.S. at 174, Congress in the CWA explicitly intended that States were to retain traditional and primary power to regulate land and water use. 33 U.S.C. § 1251(b). As recognized by the CWA, farmers' and ranchers' agricultural land uses, including activities like plowing, are traditional matters of state and local, not federal, control. 33 U.S.C. §§ 1288, 1329; Pet. App. 210, 212. Regulating the depth of agricultural plowing intimately involves the regulation of land use – a matter within traditional state and local power. The general policy of the CWA is to study agriculture, but as a "nonpoint" source whose regulation is left to the States. As Judge Gould aptly observed, there is nothing approaching a clear statement or indication in the CWA or its legislative history that Congress intended to regulate plowing – in fact, quite the opposite is true: the unambiguous plain language of the CWA, its legislative history, and authorized agency implementing regulations and guidance all clearly state plowing is **entirely outside of Section 404's provisions**. Where administrative statutory interpretation alters the federal-state framework by permitting federal encroachment on traditional state powers, courts do not apply the deferential standard of *Chevron*, 467 U.S. 837 (1984). *SWANCC*, 531 U.S. at 173. Rather, in such cases, Congress must "convey its purpose clearly" or courts will deem it not to "have significantly changed the federal state balance." *Id.*, quoting *United States v. Bass*, 404 U.S. 336, 349 (1971).

The Ninth Circuit's expansive and activist definition of the terms "discharge," "addition," "point source" and "pollutant," and unwarranted narrow interpretation of the farming exemptions, so as to include the pure plowing done in this case within the Corps' CWA Section 404 jurisdiction, substantially expands federal power to an unprecedented extent at the expense of State and local authority. *SWANCC* forbids this absent Congress' clearly-expressed intent. As Judge Gould stated: "If Congress intends to prohibit so natural a farm activity as plowing, and even the deep plowing that occurred here, Congress can and should be explicit. Although we interpret the prohibition of the [CWA] to effectuate Congressional intent, it is an undue stretch for us absent a more clear directive from Congress, to reach and prohibit the plowing done here, which seems to be a traditional form of farming activity." Pet. App. 19-20.

III. THE CWA DOES NOT AUTHORIZE IMPOSING MULTIPLE MAXIMUM DAILY CIVIL PENALTIES FOR VIOLATIONS OF THE SAME CATEGORY BY THE SAME POINT SOURCE ON THE SAME DAY.

Even if plowing is a regulable activity under CWA Section 404, the Ninth Circuit nevertheless erred when it held the maximum CWA penalty was properly calculated by multiplying the *number of passes* the district court found were made by the plow through each jurisdictional feature by the statutory dollar amount, rather than multiplying the *number of days* during which plowing "discharges" occurred in particular "waters" by the statutory dollar amount. Pet. App., 12-16.

33 U.S.C. Section 1319(d), Pet. App. 209, authorizes civil penalties "not to exceed $25,000 *per day for each violation*" against persons violating Section 1311(a) by discharging pollutants without a permit. This statute contem-

plates maximum penalties will be calculated not in terms of the total number of individual violations of the same type, but, rather, in terms of *daily violation units*. The "top-down" method of penalty assessment (employed here) involves calculating the maximum statutory penalty by first finding how many distinct *categories* of CWA violations occurred, and then finding the number of days during which each category occurred and multiplying the number of days by $25,000. *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 791 F.2d 304, 314 (4th Cir. 1986), vacated and remanded on other grounds, 484 U.S. 49 (§ 1319(d) speaks "in terms of penalties *per day* of violation, rather than *per violation*."); *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1139 (11th Cir. 1990) ("each *distinct* violation is subject to a separate *daily* penalty assessment of up to $25,000"); *Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F.Supp. 1368, 1395 (D. Haw. 1993) (discussing top-down method of calculating number of categories and "*daily violations*" to arrive at maximum penalty).

The *Gwaltney* court rejected defendant's interpretation there as untenable because it impermissibly calculated the statutory maximum penalty "*per violation*," rather than "*per day* of violation." *Gwaltney*, 791 F.2d at 314. The Ninth Circuit and district courts here, too, read the words "per day" entirely out of the statute and impermissibly divided daily "soil discharges" within a single category of violation into hundreds of separate violations. Pet. App. 12-16. Under *Gwaltney*, Tsakopoulos' *maximum* penalty should have been limited to, at most, the *number of days* during which the same type of "point source discharges" of soil actually occurred in waters. Counting as separate violation units the number of times a single point source (i.e., a plow shank) crossed a single jurisdictional feature during a single day impermissibly converts a single *daily* violation unit of the same activity into numerous sub-daily violation units and illegally establishes the maximum penalty "per violation,

rather than per day of violation" – a result "inconsistent with the language of § 1319(d)." *Gwaltney*, 791 F.2d at 314.[26]

Where the "violation unit" is measured by less than a single day's period of time – for example, an "hourly maximum violation" occurring multiple times during the same day – the CWA limits the maximum penalty to one day for all such violations *if they are of the same type*. *United States v. Amoco Oil Co.*, 580 F.Supp. 1042, 1046, n. 1 (W. D. Mo. 1984), cited with approval by *Tyson Foods*, 897 F.2d at 1138, 1138-1139 (holding Congress amended § 1319(d)'s language to its current "per day for each violation" to clarify the statute in accordance with *Amoco*'s interpretation).

Tsakopoulos' alleged violations all fell within the *single distinct category* of alleged discharge of a single "pollutant" – "fill" from native soil turned in place – from a "point source" without a permit. Pet. App. 15. In performing its "top down" analysis, the court should therefore have added the number of *daily* violations of this category and multiplied that total by $25,000. *Hawaii's Thousand Friends*, 821 F.Supp. at 1395. The Ninth Circuit admitted the fact that all violations were of the same type made its penalty holding problematic, Pet. App. 14-15, because the cases it relied on imposed multiple penalties for "separate" violations on the same day only where the violations are in *different and distinct categories*. Pet. App. 28. Nevertheless, despite extensive evidence introduced by the Government in the form of daily time records of the deep plow operators, the lower courts

[26] The government incorrectly contends *Gwaltney* is irrelevant because it discusses a prior version of CWA § 309(d). Opp. Br. 20. In fact, *Atlantic States Legal Foundation, Inc. v. Tyson Foods*, 897 F.2d 1128 (11th Cir. 1990), held Congress' 1987 Amendment to CWA § 309(d) (33 U.S.C. § 1319(d)), to which respondents refer, was "intended to *clarify* that each *distinct* violation is subject to a separate *daily* penalty assessment of up to $25,000". *Id.* at 1139, add'l emph. added, quoting H.R. Rep. No. 99-1004, 99th Cong., 2d Sess. 132.

failed to engage in *any* analysis of the number of days on which such plowing occurred and never even *estimated* the number of daily violation units. CR189, ER1042-1043.

The Ninth Circuit majority admitted its approach was not "free from difficulty," but read the "per day" language out of the statute anyway because of supposed "incentive problems." Pet. App. 15. The rule of lenity compels a narrower, more limited construction in accordance with past precedents, however, since "[c]ivil penalties may be considered 'quasi-criminal' in nature," *First American Bank of Virginia v. Dole*, 763 F.2d 644, 651, fn. 6 (4th Cir. 1985), and substantially similar language -- "per day of violation" -- governs *criminal* penalties for negligent and intentional violations under 33 U.S.C. § 1319(c)(1), (2), as well.[27] *Crandon v. United States*, 494 U.S. 152, 158 (1990) (rule of lenity is "time-honored interpretive guideline" applied to resolve any ambiguity in ambit of criminal statute's coverage); *United States v. Thompson/Center Arms Company*, 504 U.S. 505, 525 (1992) ("The main function of the rule of lenity is to protect citizens from the unfair application of ambiguous punitive statutes") (dis. opn. of Stevens, J.) The Ninth Circuit's approach to interpretation not only violates the rule of lenity, but it is arbitrary, since there is no logical stopping

[27] It would seem anomalous to hold those prosecuted *criminally* for numerous repeated violations of a single category on a single day are subject to a *lesser* fine than those prosecuted *civilly* for the same number of violations, on the basis that the civil statute allows "stacking" while the criminal provision does not. The *Tyson* court held the language "per day of such violation" meant the same thing as the slightly differently worded "per day for each violation," *Tyson Foods*, 897 F.2d at 1139, and the former phrase is essentially equivalent to the criminal penalty "per day of violation" language. Moreover, lenity is compelled by due process given the complete failure of the CWA and agency regulations, or even any authoritative interpretation thereof, to provide fair or adequate (or any) notice to petitioners that their plowing conduct was regulated under CWA Section 404 in the first place. E.g., *Gates & Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 155-157 (D.C. Cir. 1986) (Scalia, J.).

point for calculating daily penalty assessments. If each plow has multiple shanks, why not assess a separate daily penalty for each individual furrow created on each pass? And if each furrow pass is a separate daily violation, why not each yard, each foot, or each inch thereof? Nor is this arbitrary interpretation of § 1319(d) fairly supported by otherwise "irrational results" or the "policy goal of discouraging pollution." Pet. App. 15.

The Ninth Circuit's rationales for imposing multiple maximum daily penalties for repeated violation of the same category on the same day necessarily presuppose a *knowing* and *intentional* violator, and fail to account for the fact that such violators are already subject to *substantial additional criminal penalties* under the CWA, including first-time fines up to $50,000 per day and three years imprisonment, *see* § 1319(c)(2) – clearly significant deterrents to *intentional* misconduct.[28] Since the criminal penalty provisions already prescribed by Congress in § 1319(c) fully allay any supposed "incentive" concerns, such concerns cannot support the Ninth Circuit's erroneous and arbitrary interpretation of § 1319(d)'s *civil* penalty provision.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

[28] Tsakopoulos' violations were neither alleged by the government nor found by the district court to be intentional. Pet. App. 143-144.

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ANGELO K. TSAKOPOULOS, PETITIONERS

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QUESTIONS PRESENTED

Section 404 of the Federal Water Pollution Control Act (Clean Water Act) regulates the discharge of dredged or fill material into waters of the United States. 33 U.S.C. 1344. Section 404(f) exempts from regulation the discharge of dredged or fill material from "normal farming, silviculture, and ranching activities," but excepts from that exemption any discharge that is "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. 1344(f). In this case, petitioners engaged in "deep ripping," which involves using bulldozers to pull long metal shanks through the ground, to convert grazing lands into lands suitable for cultivating deep-rooted crops. In the process, petitioners filled two acres of wetlands, which were indisputably waters of the United States, with dirt, rock, sand, and biological matter. The questions presented are:

1. Whether petitioners' deep ripping resulted in discharges of pollutants subject to regulation under Section 404.

2. Whether petitioners' deep ripping qualified for the conditional exemption from regulation under Section 404(f).

3. Whether each violation of the Clean Water Act should be counted in determining the maximum civil penalty if several violations occurred on a single day.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 261 F.3d 810. The district court's amended order on cross-motions for summary judgment (Pet. App. 28-56) and its findings of fact and conclusions of law (Pet. App. 67-121) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2001. A petition for rehearing was denied on November 28, 2001 (Pet. App. 208). The petition for a writ of certiorari was filed on February 22, 2002, and granted on June 10, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, are reprinted at Add., *infra*, 1a-5a. Pertinent regulations of the Army Corps of Engineers, 33 C.F.R. Part 323, are reprinted at Add., *infra*, 6a-8a, and those of the Environmental Protection Agency, 40 C.F.R. Part 232, are reprinted at Add., *infra*, 9a-11a.

STATEMENT

Petitioners seek reversal of a court of appeals judgment affirming a district court decision that petitioners violated Sections 301 and 404 of the Clean Water Act, 33 U.S.C. 1311, 1344, by discharging dredged and fill material into waters of the United States without a permit. Petitioners converted approximately 924 acres of former grazing land into lands suitable for cultivation of deep rooted crops by means of a process known as "deep ripping," which involves the use of bulldozers pulling four-to-seven-foot-long metal shanks

through the ground to break up and redistribute essentially impermeable subsurface materials. In doing so, they filled two acres of wetlands with dirt, rock, sand, and biological matter. Those wetlands are conceded to be waters of the United States and therefore within the geographic scope of Section 404's permitting program.

Section 404 places no limitation on petitioners' deep ripping of the many acres surrounding the wetlands. However, the United States Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) consistently and repeatedly told petitioners that they needed to obtain a Section 404 permit before engaging in deep ripping *in* the wetlands themselves. Petitioners did not do so, and instead they repeatedly engaged in deep ripping of wetland areas. When the Corps and EPA continued to seek petitioners' compliance with Section 404's requirements, petitioners brought this lawsuit. EPA then counterclaimed that petitioners had violated the Clean Water Act. The district court rejected petitioners' claim that their activities are not subject to Section 404's requirements. Because of the "relative seriousness" of the violations and petitioners' "lack of earnest effort to comply with the Act" (Pet. App. 117), the court imposed a substantial civil penalty. The court of appeals affirmed.

A. The Clean Water Act

The Clean Water Act establishes a comprehensive program for regulation of pollution discharges, including the discharge of dredged or fill materials into waters of the United States. The Federal Water Pollution Control Act Amendments of 1972 (the 1972 Amendments) established the primary components of the current regulatory structure and instituted the Section 404 permitting program. Pub. L. No. 92-500, § 2, 86 Stat. 884. Congress refined that program through the Clean Water Act of 1977 (the 1977 Amendments), which, among other things, created the Section

404(f) exemption for "normal farming, silviculture, and ranching activities." Congress explicitly excepted from that exemption discharges that bring an area of waters of the United States into a new use and that impair the flow or reduce the reach of such waters. Pub. L. No. 95-217, § 67(a)-(b), 91 Stat. 1600. The Water Quality Act of 1987, Pub. L. No. 100-4, § 313(d), 101 Stat. 45-46, retained the Section 404 regulatory structure, but increased the maximum civil penalty for violations and clarified the method for calculating penalties.

1. The 1972 Amendments. Congress enacted the 1972 Amendments "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," 33 U.S.C. 1251(a). See *Solid Waste Agency (SWANCC)* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 166 (2001); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). That objective embraced "a broad, systemic view of the goal of maintaining and improving water quality," including preservation of "the natural structure and function of ecosystems." *Id.* at 132 (quoting H.R. Rep. No. 92-911, at 76 (1972)). "Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" *Id.* at 132-133 (quoting S. Rep. No. 92-414, at 77 (1971)).

To achieve the stated objective, Congress set forth key provisions that, for 30 years, have remained fundamental features of the Clean Water Act. Congress declared in Section 301(a) that, except as provided in other specified sections of the Act, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. 1311(a). It set out relevant definitions in Section 502 of the Act. See 33 U.S.C. 1362. Congress defined the term "discharge of pollutants" to include "any addition of any pollutant to navigable waters from

any point source." 33 U.S.C. 1362(12)(A). It defined the term "pollutant" to include a wide variety of materials, including "dredged spoil," "biological materials," "rock," "sand," and "cellar dirt," 33 U.S.C. 1362(6), and it broadly defined the term "navigable waters" to mean "waters of the United States." 33 U.S.C. 1362(7). Furthermore, Congress defined the term "point source" to mean "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. 1362(14).

As this Court has long recognized, Section 301(a) prohibits a person from discharging dredged or fill materials from a point source into wetlands that qualify as "waters of the United States"—sometimes called "jurisdictional wetlands" ——unless that person obtains a permit in accordance with Section 404 of the Act. 33 U.S.C. 1311(a), 1344. See *Riverside Bayview Homes*, 474 U.S. at 123. As a Senate Committee has explained, Congress has charged the Corps with responsibility for issuing Section 404 permits to

> control the adverse effects caused by point source discharges of dredged or fill material into the navigable waters including: (1) the destruction and degradation of aquatic resources that results from replacing water with dredged material or fill material; and (2) the contamination of water resources with dredged or fill material that contains toxic substances.

S. Rep. No. 95-370, at 74 (1977). As Congress, the courts, EPA, and the Corps have all long recognized, the Section 404 permitting process is crucial to preserving and restoring aquatic ecosystems because wetlands "play a key role in protecting and enhancing water quality" and "serve significant natural biological functions." *Riverside Bayview Homes*, 474 U.S. at 133-135 (citing Corps statements and regulations).[1]

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[1] See, *e.g.*, *United States* v. *Deaton*, 209 F.3d 331, 336 (4th Cir. 2000); *United States* v. *Larkins*, 657 F. Supp. 76, 86 (W.D. Ky. 1987), aff'd, 852 F.2d 189 (6th Cir. 1988), cert. denied, 489 U.S. 1016 (1989); *United States* v. *Holland*, 373 F. Supp. 665, 675 (M.D. Fla. 1974); 16 U.S.C. 3901(a); 40 C.F.R. Pt. 230.

Congress also provided mechanisms for enforcing Section 301(a)'s discharge prohibition. Section 309 authorizes the government to issue compliance orders, pursue judicial injunctive relief, and seek criminal and civil penalties. See 33 U.S.C. 1319. Section 309, as set out in the 1972 Amendments, specified that any person who violated Section 301(a) "shall be subject to a civil penalty not to exceed $10,000 per day of such violation." 33 U.S.C. 1319(d) (Supp. II 1972) (86 Stat. 860).

2. The 1977 Amendments. The 1977 Amendments were "a major piece of legislation aimed at achieving 'interim improvements within the existing framework' of the Clean Water Act." *Riverside Bayview Homes, Inc.*, 474 U.S. at 135 (quoting H.R. Rep. No. 95-139, at 1-2 (1977)). Congress held extensive hearings on the implementation of the Clean Water Act and specifically addressed, among other things, the competing concerns that agricultural practices seriously degrade the Nation's waters, but that extensive federal regulation of agricultural practices could impose hardships on farmers.[2]

Congress declined to exempt all agricultural lands or practices from regulation. Instead, it took carefully measured steps to address specific problems. For example, Congress made limited changes to the provisions of the 1972 Amendments that addressed the term of art "point source." See

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[2] As the Report of the Senate Committee on Environment and Public Works noted, "[a]griculture was demonstrated to be a major source of pollution." S. Rep. 95-370, at 9 (1977). But as the Report also noted, "[t]he upland farming, forestry and normal development activity carried out primarily by individuals and as part of family business or family farming activity need not bear the burden of an effort directed primarily at regulating the kinds of activities which interfere with the overall ecological integrity of the Nation's waters." *Id.* at 10.

CWA § 502(14), 33 U.S.C. 1362(14). Congress retained the specification that a "concentrated animal feeding operation" is a point source, but it explicitly provided that the term "point source" does not include "return flows from irrigated agriculture." See *ibid.*[3]

The 1977 Amendments did not exempt any other agricultural activity from the definition of "point source." Congress, however, did address the application of the Section 404 program to "normal farming, silviculture, and ranching activities" through a new provision contained within Section 404 itself. Congress added a new subsection (f), which provides:

> (1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material–
>
> > (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> * * * * *
>
> is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title. * * *
>
> (2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters

[3] The Senate Report indicates that "[t]he current strategy in the act to divide agriculture into point and nonpoint sources is effective with regard to feedlots, but ineffective with regard to irrigation return flows." S. Rep. No. 95-370, at 9.

> be reduced, shall be required to have a permit under this section.

33 U.S.C. 1344(f). In other words, Congress recognized that even "normal" farming activities, such as "plowing," could result in discharges of dredged or fill material into waters of the United States. But it exempted those activities from the Section 404(f) permitting process, provided that the activity in question did not bring an area into a new use and impair the flow or circulation, or reduce the reach, of those waters.[4]

The 1977 Amendments also made other significant changes to Section 404, adding subsections (d) through (t). Those subsections, among other things, authorize the Corps to issue "general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material" if the Corps determines "the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. 1344(e). They also authorize individual States to administer their own permit

[4] The legislative history reveals that Section 404(f) was a compromise formulated by the Conference Committee, in response to divergent House and Senate proposals, that struck a balance between the concerns of agriculture and the congressional goal of wetlands protection. H.R. Conf. Rep. No. 95-830, at 100-101 (1977). As Senator Muskie, the Senate manager in conference, explained in the debate on the conference bill:

> New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.

3 CRS, Library of Congress, *A Legislative History of the Clean Water Act of 1977*, at 474 (1978) (*Leg. His.*), (Sen. Muskie, Dec. 14, 1977).

programs for certain waters of the United States, 33 U.S.C. 1344(g)-(*l*), and authorize the Corps to take enforcement action, including the pursuit of civil penalties, in response to permit violations, 33 U.S.C. 1344(s).

3. The 1987 Amendments. Congress revisited the Clean Water Act through the 1987 Amendments and made numerous changes, but made only one significant change to Section 404. Recognizing the potentially serious consequences of Clean Water Act violations, including Section 404 permit violations, it increased the maximum penalty from "$10,000 per day of such violation" to "$25,000 per day for each violation." 33 U.S.C. 1344(s)(4) (Section 404 permit violations); see CWA § 309(d), 33 U.S.C. 1319(d) (other Clean Water Act violations, including discharges without a permit). In changing the basis for computing the penalty, it also intended "to clarify that each distinct violation is subject to a separate daily penalty assessment of up to $25,000." H.R. Rep. No. 99-1004, at 132 (1986).[5]

B. The Corps' And EPA's Regulations

The Corps and EPA share responsibility for implementing the Section 404 program, and each has issued regulations, following public notice and comment, identifying activities that are subject to regulation. See CWA §§ 101(d), 501(a), 33 U.S.C. 1251(d), 1361(a). The pertinent Corps regulations, which are set out primarily at 33 C.F.R. Pt. 323, address, among other things, the types of dredge and fill activities that require a Section 404 permit and the scope of Section 404(f)'s "normal farming" exemption. Parallel EPA regulations are set out at 40 C.F.R. Pt. 232.

[5] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (28 U.S.C. 2461 note), as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (31 U.S.C. 3701 note), the statutory maximum penalty for violations of the Clean Water Act was increased to $27,500 per day per violation for violations occurring after January 30, 1997.

The regulations applicable to this case define "dredged material" to mean "material that is excavated or dredged from waters of the United States." 33 C.F.R. 323.2(c); 40 C.F.R. 232.2. At the relevant time, they defined the term "discharge of dredged material" to mean "any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States." 33 C.F.R. 323.2(d)(1) (1994), 40 C.F.R. 232.2 (1994).[6] Those discharges include an addition or redeposit "which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 33 C.F.R. 323.2(d)(1)(iii); 40 C.F.R. 232.2. The Corps' regulations defined "fill material" to mean "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a[] waterbody," 33 C.F.R. 323.2(e) (1994), while EPA's regulations similarly defined that term to mean "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose," 40 C.F.R. 232.2 (1994).[7] The "discharge of fill material" means "the addition of fill material into waters of the United States." 33 C.F.R. 323.2(f); 40 C.F.R. 232.2.

The agencies' regulations specifically acknowledge Section 404(f)'s "normal farming" exemption, repeating its terms

[6] After the events at issue in this case, the agencies amended the definition in response to *National Mining Ass'n* v. *United States Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998), to state "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States." 64 Fed. Reg. 25,123 (1999).

[7] The agencies have since amended the definition of "fill material" to state "the term fill material means material placed in waters of the United States where the material has the effect of: (i) [r]eplacing any portion of a water of the United States with dry land; or (ii) [c]hanging the bottom elevation of any portion of a water of the United States." 67 Fed. Reg. 31,142-31,143 (2002).

verbatim. 33 C.F.R. 323.4(a)(1)(i); 40 C.F.R. 232.3(c)(1)(i). They further state that, to fall under the exemption, the activities in question "must be part of an established (i.e. ongoing) farming, silviculture, or ranching operation" and that "[a]ctivities which bring an area into farming, silviculture, or ranching use are not part of an established operation." 33 C.F.R. 323.4(a)(1)(ii); 40 C.F.R. 232.3(c)(1)(ii). The regulations define the terms "cultivating," "harvesting," "minor drainage," "plowing," and "seeding." 33 C.F.R. 323.4(a)(1)(iii); 40 C.F.R. 232.3(d). With respect to plowing, the regulations state:

> *Plowing* means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. * * *.

33 C.F.R. 323.4(a)(1)(iii)(D); see 40 C.F.R. 232.3(d)(4). The regulations further state that "[p]lowing *as described above*, will never involve a discharge of dredged or fill material." *Ibid.* (emphasis added). Accord 33 C.F.R. 323.2(f)

The agencies have provided informal guidance as well. The Corps issued Regulatory Guidance Letter No. 86-01 (Feb. 11, 1986), which reiterated its regulatory definition of plowing. See Add., *infra*, 12a-13a. The Corps and EPA also issued a Memorandum to the Field on December 12, 1996, following the entry of an administrative order on consent in this case, specifically addressing the application of Section 404 to "deep ripping" activities, such as those that precipitated this dispute. Pet. App. 199-207; Add., *infra*, 14a-21a. The agencies noted that:

> Deep-ripping and related activities are distinguishable from plowing and similar practices (e.g., discing, harrowing) with regard to the purposes and circumstances under which it is conducted, the nature of the equipment that is used, and its effect, including the particular impacts to the hydrology of the site.

Add., *infra*, 18a. They concluded that:

> Deep-ripping and related activities in wetlands are *not* part of a normal, ongoing activity, and therefore *not* exempt, when such practices are conducted in association with efforts to establish for the first time * * * an agricultural, silvicultural, or ranching operation. In addition, deep-ripping and related activities are not exempt in circumstances where such practices would trigger the "recapture" provision of Section 404(f)(2) * * *.

Id. at 20a.

C. The Facts Of This Case

The district court based its decision on detailed findings of fact, Pet. App. 67-92, which the court of appeals affirmed, *id.* at 11-12. Petitioners largely disregard those findings, which they have not challenged and which are not open to dispute in this proceeding. See, *e.g.*, *United States* v. *Ceccolini*, 435 U.S. 268, 273 (1978); *Graver Tank & Mfg.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). The facts, as found by the district court, and the undisputed facts set out in the district court's amended order granting partial summary judgment (Pet. App. 28-56), are as follows:

1. In June 1993, petitioner Angelo K. Tsakopoulos, the general partner of petitioner Borden Ranch Partnership, purchased Borden Ranch, an 8348-acre ranch located in California's Central Valley, for approximately $8.3 million. Pet.

App. 2, 68. The Ranch straddles Dry Creek, which forms the border between Sacramento and San Joaquin Counties, and had primarily been used as rangeland for cattle grazing. *Id.* at 2, 44, 68; SER 76.[8] Tsakopoulos intended to subdivide the Ranch and sell individual parcels that would be suitable for cultivation as vineyards and orchards, which would increase the value of the property. Pet. App. 2, 47, 68.

To accomplish this goal, Tsakopoulos needed to address the Ranch's soil and hydrology. Portions of the subsurface strata of the Ranch consisted of a dense, essentially impermeable layer of material, variously described as a "restrictive layer" or "claypan," that prevented surface water from reaching the depths required for cultivating vineyards or orchards, which have deep root systems. Pet. App. 2-3, 44-45, 69. Tsakopoulos planned to solve this problem through "deep ripping," which consisted of employing bulldozers or tractors to drag four-to-seven-foot-long metal shanks through the soil. *Id.* at 3, 35-36, 44-45, 69-70. Those shanks would "gouge[] through the restrictive layer, disgorging soil that is then dragged behind the ripper." *Id.* at 3; see *id.* at 35-36, 44, 69-70. Deep ripping was neither necessary nor was it utilized to maintain the Ranch lands for grazing, but it was essential to prepare the area for its intended new use. *Id.* at 2-3, 44-45, 69.

As Tsakopoulos knew at the time he purchased the Ranch, the property included not only upland, but also significant hydrological features, including swales, intermittent drainages, and vernal pools. Pet. App. 2, 68-69, 70.[9] Those features arise precisely because of the presence of the essentially impermeable restrictive layer that prevents surface water from penetrating deeply into the soil. *Ibid.* The swales and drainages of interest in this case are hydrologically connected to creeks on the property, which in turn are tributaries of the Cosumnes and Mokelumne Rivers. *Id.* at 69; ER 29 (wetland delineation of San Joaquin side of the Ranch).[10]

Deep ripping, particularly at the depth and on the scale that Tsakopoulos planned, has a dramatic effect on the character of a wetland area. As the district court specifically found, deep ripping "alters the movement of surface and subsurface water in the ripped areas by moving earth, rock, sand, and biological matter both horizontally and vertically. This allows water to percolate to greater depths and limits or destroys the ability of jurisdictional waters to retain water." Pet. App. 70. As a result of deep ripping, wetland features can be—and in this case were—"completely filled" and "obliterated." *Id.* at 87-88, 106.

Tsakopoulos, an experienced real estate developer who had previously sought Section 404 permits, "was aware that most or all of the [hydrologic] features constituted 'waters of the United States.'" Pet. App. 2, 70. The Corps expressly informed him in mid-1993 that he would need to obtain a Section 404 permit before deep ripping in those waters. *Id.* at 70-71. Nevertheless, in October 1993, he initiated deep ripping in wetlands without a permit on a portion of the Ranch. *Id.* at 3, 71-72. The Corps attempted to resolve the matter consensually and, in March 1994, granted Tsakopou-

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[8] Some of the "bottom ground" along Dry Creek had also been used for growing wheat, hay, alfalfa, tomatoes, sugar beets, beans, and corn, but that part of the Ranch is not at issue in this case. Pet. App. 2, 68; SER 76. See note 27, *infra*.

[9] "A swale is a sloped wetland containing aquatic plant life which allows passage of small animal life, slows peak water flows, filters water, and minimizes erosion and/or sedimentation. A vernal pool is a low point in the landscape underlain with a dense soil layer and wherein rainwater collects. * * * Intermittent drainages are basically streams or water courses with a defined bed and bank that generally transport water during and after rains." Pet. App. 69.

[10] Petitioners do not contest that the swales and drainages at issue in this proceeding are "waters of the United States" within the meaning of the Clean Water Act. See Br. 2 n.1.

los an "after-the-fact" permit for that activity in exchange for Tsakopoulos's agreement to undertake certain mitigation activities, including construction of 4.77 acres of seasonal wetlands. *Id.* at 3, 72.

At a meeting in September 1994, Tsakopoulos informed the Corps and EPA that he intended to resume deep ripping uplands, and those agencies again informed Tsakopoulos that he was not to deep rip in protected waters without a permit. Pet. App. 3, 73. Nevertheless, the agencies discovered in April 1995 that Tsakopoulos had undertaken more unpermitted deep ripping of wetlands. *Id.* at 3, 74. The Corps responded by issuing a cease-and-desist letter directing him to stop deep ripping in waters of the United States. *Id.* at 3, 74. Tsakopoulos submitted a permit application in May, and the Corps sent him a permit by the end of the month. *Id.* at 74.

In summer 1995, Tsakopoulos initiated further deep ripping on other parcels of the Ranch without a permit, and in November 1995, the Corps issued another cease and desist order. Pet. App. 3, 74-75. In May 1996, the government and Tsakopoulos entered into an "administrative order on consent" (AOC) to resolve the ongoing dispute, which implicated 49.1 acres of waters of the United States on the Sacramento County side of the Ranch. *Id.* at 3, 77. Tsakopoulos agreed to cease further discharges into waters of the United States except in compliance with an appropriate authorization under the Clean Water Act. *Id.* at 78. By the time of the AOC, Tsakopoulos had deep ripped and sold 4,036 acres of the Ranch for a total of approximately $16.2 million. *Id.* at 77.

Despite the entry of the AOC, and the preparation of a map specifically identifying the location of waters of the United States, Tsakopoulos resumed deep ripping those waters without a permit in November 1996. Pet. App. 4, 76-77, 78, 79-80, 82-83. After EPA investigators visited the Ranch in April 1997 and observed fully-engaged rippers at work in

jurisdictional wetlands, EPA issued an administrative order finding that Tsakopoulos had violated the Clean Water Act. *Id.* at 4, 83-84, 103.[11] In a meeting later that month, the agencies confronted Tsakopoulos with evidence of the violations, and he "then conceded that mistakes had been made." *Id.* at 11, 85.[12]

2. After the April 1997 meeting, petitioners initiated this action challenging the authority of the Corps and EPA to regulate deep ripping. EPA counterclaimed, seeking injunctive relief and civil penalties for Clean Water Act violations

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[11] Petitioners assert that all deep ripping activities at issue in this action were complete prior to December 1996. Br. 13. This assertion conflicts with the district court's finding that, *e.g.*, "eyewitness evidence reveals that, in April of 1997, deep ripping of unspecified jurisdictional features occurred on parcel 8." Pet. App. 103. The government did not seek the higher penalty available for violations occurring after January 30, 1997, however, because it was not clear which of the wetlands were affected by the April 1997 ripping, as opposed to the November 1996 ripping. *Id.* at 103-104. See also ER 630 ¶ 13 (Tsakopoulos acknowledges that he authorized spring 1997 deep ripping in parcel 8 on San Joaquin County side of the Ranch).

[12] Petitioners assert that, "[r]elying on the Corps' contradictory oral and written advice differentiating among different forms of plowing based on depth, Tsakopoulos tried to plow in ways the Corps told him would not require permits." Br. 12. The district court rejected that claim:

> Tsakopoulos deliberately obfuscated his understanding of the Corps' guidance respecting driving over vernal pools and undermined the Corps' enforcement authority by wrongly stating the agency gave him confusing guidance as to the nature of the contact he could have with jurisdictional waters. He knew he was not authorized to deep rip any jurisdictional features.

Pet. App. 114. See *id.* at 73 n.2 (Tsakopoulos's "testimony [respecting discing in vernal pools] was not veracious and is belied by the consistent position federal officials expressed to Tsakopoulos on this matter."); *id.* at 114 n.19 ("Tsakopoulos knew that the Corps'[] direction to him about his activities on jurisdictional waters was clear and consistent."); *id.* at 115 ("the evidence demonstrates that there was no serious effort to avoid waters of the United States when deep rippers plowed nearly all of parcel 10").

in connection with petitioners' deep ripping activities involving parcels 6, 8, 9, and 10 on the San Joaquin County side of the Ranch, which had not been addressed through the AOC. Pet. App. 4, 67, 86; see *id.* at 86-92 (describing those parcels). Those four parcels comprise some 924 acres. See *id.* at 76, 88, 89.[13]

The parties moved for summary judgment, and the district court granted partial summary judgment in favor of the government. Pet. App. 28-56. The district court dismissed petitioners' claims, holding that petitioners' activities were subject to the Section 404 permitting process because they "may cause discharge of fill material or pollutant into waters of the United States." *Id.* at 41. The district court further held that petitioners' activities did not qualify for Section 404(f)(1)'s normal farming exemption, *id.* at 42-47, and that, even if they did, those activities were recaptured under Section 404(f)(2), *id.* at 47-49. The district court determined, however, that there remained disputed facts concerning the extent and effects of particular instances of deep ripping. *Id.* at 5, 41.

The district court resolved those factual issues after a four-week bench trial at which the court heard evidence from more than twenty witnesses and received hundreds of documentary exhibits. Pet. App. 5; see *id.* at 67-121. The district court determined that petitioners' deep ripping had filled approximately two acres of jurisdictional wetlands and resulted in 358 violations, relying on the parties' apparent agreement that each pass of a ripper through a protected wetland constitutes a separate violation. *Id.* at 5, 103, 104. The court observed that "[t]he relative seriousness of Tsakopoulos' violations and his lack of earnest effort to comply with the Act merit a significant penalty." *Id.* at 117. The

[13] The government's calculation of the acreage of those parcels rests, in part, on petitioners' responses to interrogatories, which are not part of the record.

court therefore rejected Tsakopoulos's proposal that, "if a civil penalty is to be imposed, it should not exceed $97.26." *Id.* at 101. Nevertheless, the court did not assess its calculated maximum civil penalty of $8,950,000 and, instead, gave petitioners the choice of paying a $1.5 million civil penalty or paying a $500,000 penalty and restoring four acres of wetlands. *Id.* at 5, 105. Petitioners chose the latter option. *Id.* at 5, 127-133.

3. The court of appeals affirmed "the district court's holding that deep ripping in this context is subject to the jurisdiction of the Corps and the EPA." Pet. App. 17. It noted that the courts of appeals have consistently held that redeposit of materials into waters of the United States can constitute an "addition of a pollutant" under the Clean Water Act. *Id.* at 6-8. The court of appeals also rejected petitioners' contention that redeposits from a "plow" are not discharges from a "point source." *Id.* at 8-9. The court reasoned that "[t]he statutory definition of a 'point source' ('any discernible, confined, and discrete conveyance') is extremely broad," that other courts "have found that 'bulldozers and backhoes' can constitute 'point sources,'" and that the combination of "bulldozers and tractors" pulling "large metal prongs" also satisfies the statutory definition. *Ibid.*

The court of appeals concluded that petitioners' deep ripping was not exempt from regulation under Section 404(f)(1)'s normal farming exemption. Pet. App. 9-10. The court observed that the exemption is subject to a "significant qualifying provision," because "even normal plowing can be regulated under the Clean Water Act if it falls under this so-called 'recapture' provision" in Section 404(f)(2). *Id.* at 9. The court of appeals agreed with the district court that "[c]onverting ranch land to orchards and vineyards is clearly bringing the land 'into a use to which it was not previously subject,' and there is a clear basis in this record to conclude that the destruction of the soil layer at issue here constitutes

an impairment of the flow of nearby navigable waters." *Id.* at 10. The court accordingly "conclud[ed] that the deep ripping at issue in this case is governed by the recapture provision" and that it was "entirely proper" for the government to exercise jurisdiction over petitioners' deep ripping. *Ibid.*

The court of appeals affirmed the district court's calculation of the civil penalty. Pet. App. 12. It rejected petitioners' argument that the Clean Water Act imposes a maximum penalty of $25,000 for any day in which ripping violations occurred, regardless of the total numbers of rippings in the day. The court stated that the focus in the statutory penalty provision "is clearly on *each* violation" and that a contrary rule would encourage violators to "stack" violations on particular days. *Id.* at 13. The court of appeals concluded that petitioners' other challenges to the civil penalty assessment, none of which they raise here, lacked merit. *Id.* at 12.

The court of appeals reversed the district court's findings of Clean Water Act violations in one isolated vernal pool in light of the government's withdrawal of its enforcement claim for that pool as a result of this Court's decision in *SWANCC*, 531 U.S. at 171. Pet. App. 10-11. The court accordingly remanded the case to the district court for recalculation of the civil penalty. *Id.* at 17. Judge Gould dissented. *Id.* at 18-22. He would have held "that the district court erred in finding that the activities here required a permit and otherwise violated the Clean Water Act." *Id.* at 22.

SUMMARY OF ARGUMENT

I. Petitioners discharged pollutants, specifically, dredged and fill materials, into waters of the United States without a permit, in violation of Sections 301(a) and 404 of the Clean Water Act, 33 U.S.C. 1311(a), 1344. Section 502(12) defines the "discharge of a pollutant" as the "addition of any pollutant" from "any point source." 33 U.S.C. 1362(12). Petitioners' use of deep rippers—a form of earthmoving equipment—to fill wetlands plainly meets that definition.

A. The material in question—rock, sand, dirt, and biological matter—falls squarely within Section 502(6)'s definition of a "pollutant," which includes "dredged spoil," "biological materials," "rock," and "sand." 33 U.S.C. 1362(6). It also falls within the conventional understanding and applicable regulatory definitions of "dredged material," which is "material that is excavated or dredged from waters of the United States," 33 C.F.R. 323.2(c); 40 C.F.R. 232.2, and "fill material," which includes "any material" that is used for the purpose of filling a wetland, 33 C.F.R. 323.2(e) (1994); 40 C.F.R. 232.2 (1994).

B. Petitioners' deep ripping activities resulted in the "addition" of the pollutants. The district court found that those activities resulted in filling the wetlands through the horizontal movement of material from adjacent uplands and the vertical movement of material from beneath the wetland. The district court did not credit petitioners' factual claim that its activities merely "turned soil in place" and "added nothing." Indeed, even if petitioners had merely ripped materials from within the wetlands and redeposited them there, that activity would change the character of the removed materials and result in the addition of a pollutant. The applicable regulations state, and the courts have repeatedly held, that the filling of a wetland through the removal and redeposit of materials therein is a discharge of dredged materials. 33 C.F.R. 323.2(d)(1) (1994); 40 C.F.R. 232.2 (1994).

C. Petitioners' use of deep rippers resulted in an addition of pollutants "from a point source." Section 502(14) defines a "point source" as "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. 1362(14). The earthmoving equipment that petitioners employed meets that definition because it constitutes an identifiable, limited, and distinct physical

means for adding dredged and fill materials to a wetland. The courts of appeals have consistently treated earthmoving equipment of this character as a point source.

D. Section 404(f)'s conditional exemption for "normal" farming provides an additional textual indication that petitioners' activities, which they describe as mere "plowing," resulted in a discharge of a pollutant. 33 U.S.C. 1344(f). Congress created that exemption precisely because it recognized that even "normal" farming activities, such as ordinary "plowing," could result in the discharge of a pollutant within the meaning of the Clean Water Act.

II. Section 404(f) does not exempt petitioners' deep ripping from the Section 404 permitting process because petitioners' activity does not qualify as a "normal" farming activity under Section 404(f)(1)(A) and, even if it did, it would be subject to the exception to that exemption, set out in Section 404(f)(2). 33 U.S.C. 1344(f).

A. Petitioners' activities do not satisfy the requirements of Section 404(f)(1)(A) for two reasons. First, they are not part of an ongoing farming operation. 33 C.F.R. 323.4(a)(1)(ii); 40 C.F.R. 232.3(c)(1)(ii). The district court found that there was no ongoing farming operation on the areas at issue and that the deep ripping was necessary to prepare the area for the change in use. Second, petitioners' activity did not meet the regulatory definition of plowing, which "does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land." 33 C.F.R. 323.4(a)(1)(iii)(D); see 40 C.F.R. 232.3(d)(4). Petitioners' deep ripping activities did exactly that.

B. Even if petitioners' activities constituted "normal" farming, they would not be exempt because those activities had as their purpose "bringing an area of the navigable waters into a use to which it was not previously subject" and, as a consequence of the resulting discharge of dredged and fill

materials, "the flow or circulation" of protected waters was "impaired" and "the reach of such waters" was "reduced." 33 U.S.C. 1344(f)(2). The district court found that petitioners undertook their deep ripping activities to change the use of the areas at issue and that those activities filled and destroyed protected wetlands.

III. The lower courts correctly calculated the maximum civil penalty that might be imposed in this case in accordance with Section 309(d), which authorizes a penalty not to exceed "$25,000 per day for each violation." 33 U.S.C. 1319(d). Contrary to petitioners' contentions, Section 309(d) does not create a maximum penalty cap of $25,000 per day. Rather, by its plain terms, Section 309(d) authorizes a daily penalty of $25,000 per violation for those violations that continue for more than one day. In this case, the district court correctly treated each violation—*viz.*, a pass of the ripper through a protected wetland—as occurring on a single day and as subject to a maximum penalty of $25,000. That approach is consistent with settled law.

ARGUMENT

Petitioners engaged in a practice known as "deep ripping" to convert ranchland into farmland capable of supporting deep-rooted crops. Section 404 does not prevent land developers and farmers from using that technique to excavate claypan and similar subterranean soil strata from uplands. Petitioners needed to obtain a Section 404 permit, however, before employing that highly destructive technique in waters of the United States. Petitioners' earthmoving activities, which filled federally protected wetlands with rock, sand, dirt, and biological matter, fall squarely within the Clean Water Act's prohibition of the unpermitted discharge of pollutants from a point source. Those activities, which, in the words of the trial court, "completely obliterated" numerous wetlands, also clearly fall outside of Section 404(f)'s exemption for normal farming activities that do not have as

their purpose bringing an area of waters of the United States into a new use, changing the waters' flow or circulation or impairing their reach. The district court correctly concluded that petitioners acted unlawfully, and it properly calculated an appropriate civil penalty based on the Clean Water Act's specific direction that the maximum penalty shall be "$25,000 per day for each violation," 33 U.S.C. 1319(d), rather than petitioners' preferred alternative of $25,000 per day regardless of the number of violations that occurred on a given day.

I. PETITIONERS' USE OF EARTHMOVING EQUIPMENT, WHICH FILLED WETLANDS WITH ROCK, SAND, DIRT, AND BIOLOGICAL MATTER, RESULTED IN DISCHARGES OF POLLUTANTS SUBJECT TO REGULATION UNDER SECTION 404 OF THE CLEAN WATER ACT

Petitioners analogize their deep ripping activities to ordinary plowing, which they contend does not result in the "discharge of a pollutant" within the meaning of the Clean Water Act. Br. 20-31. The court of appeals and the district court correctly rejected that argument. Petitioners' characterization of their deep ripping activities is inconsistent with the district court's factual findings, and petitioners' legal argument is inconsistent with the Clean Water Act's language, structure, and purpose. Petitioners' arguments are also inconsistent with the regulations of the Corps and EPA, which are entitled to substantial deference.[14]

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[14] See, *e.g.*, *Chemical Mfrs. Ass'n* v. *Natural Res. Def. Council*, 470 U.S. 116, 125 (1985) (EPA's view of the Clean Water Act is "entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA."); accord *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 83-84 (1980).

A. The Rock, Sand, Dirt, And Biological Matter That Petitioners Used To Fill The Wetlands Are "Pollutants"

As the district court found, petitioners employed earthmoving equipment—bulldozers fitted with "long metal 'shanks'"—to "dig into the ground to a depth of five to seven feet," ripping up a "restrictive layer" of subsurface material. Pet. App. 69-70. That practice

> alters the movement of surface and subsurface water in the ripped areas by moving earth, rock, sand, and biological matter both horizontally and vertically. This allows water to percolate to greater depths and limits or destroys the ability of jurisdictional waters to retain water.

Id. at 70. As the district court additionally found, petitioners' practice of deep ripping "caused fill material to be discharged into 35 hydrological features," *id.* at 86, partially or totally filling—and in some cases "completely oblitera[ting]"—waters of the United States, *id.* at 87-92.[15]

Petitioners incorrectly contend that the discharged material—the "earth, rock, sand, and biological matter" (Pet. App. 70)—is not a "pollutant" within the meaning of the Clean Water Act. Br. 18, 20-21, 23-24. Petitioners face a preliminary obstacle to making that argument here because they did not seek the court of appeals' review of the district court's ruling on that question. See Pet. App. 36-37. Instead, they focused their appeal on whether deep ripping resulted in an "addition" of the discharged material, arguing that deep ripping "produces only incidental fallback." See Appellants' C.A. Br. 23-32. The court of appeals correspondingly addressed *that* issue. Pet. App. 6-9. Because petitioners did not properly preserve the question of whether "earth, rock, sand, and biological matter" can constitute a

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[15] Petitioners' amici are accordingly wrong in contending that "[t]he discharge of fill material is not at issue in this case." Nat'l Ass'n of Home Builders Amicus Br. 10.

pollutant, petitioners have effectively conceded that those materials meet the definition. The Court is under no obligation to revisit the matter. See *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 42 n.5 (1998).

In any event, the Clean Water Act makes abundantly clear that those materials are pollutants. Section 502(6) expressly defines the term "pollutant" to include, among other things, "dredged spoil," "rock," "sand," and "biological materials." 33 U.S.C. 1362(6). As Congress knew, the Corps has recognized, and this case illustrates, dredged and fill material typically consists of "earth, rock, sand, and biological matter." Pet. App. 70. See, *e.g.*, *United States* v. *Deaton*, 209 F.3d 331, 335-336 (4th Cir. 2000); *United States* v. *Pozsgai*, 999 F.2d 719, 724 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *United States* v. *Tilton*, 705 F.2d 429, 430 (11th Cir. 1983); see also 33 C.F.R. 323.2(c) (defining "dredged material" to mean "material that is excavated or dredged from waters of the United States"); 33 C.F.R. 323.2(e) (1994) (defining "fill material" as "*any* material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a[] waterbody") (emphasis added); accord 40 C.F.R. 232.2 (EPA definitions).[16]

That understanding is also confirmed by Sections 301 and 404, which, in tandem, regulate the discharge of dredged or

[16] Contrary to petitioners' suggestion (Br. 23), a substance need not be a "waste" to be a pollutant. For example, a developer who seeks to fill navigable waters to build a shopping center cannot avoid Section 404's permit requirement by using "native topsoil" as fill material (Br. 24), regardless of whether that material is a "valuable natural resource" (*ibid.*). Common fill materials, including "earth, sand, rock, and biological matter" are generally not a "waste material of a human or industrial process" (Br. 23), but they qualify as "pollutants." See, *e.g.*, *Deaton*, 209 F.3d at 336; *United States* v. *Wilson*, 133 F.3d 251, 259, 274 (4th Cir. 1997)(opinions of Judges Niemeyer and Payne, respectively, recognizing that native soils may constitute a pollutant); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 924-925 (5th Cir. 1983).

fill materials. Section 301(a) provides that, "[e]xcept as in compliance with" the Clean Water Act's permitting provisions, including Section 404, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. 1311(a). Section 404(a) then states that the Corps may issue permits "for the discharge of dredged or fill material." 33 U.S.C. 1344(a). Sections 301(a) and 404(a), read together, unmistakably express Congress's understanding that the term "pollutant" includes "dredged or fill material."

B. Petitioners' Activities Resulted In The "Addition" Of Pollutants To Waters Of The United States

Petitioners next contend that their deep ripping activities did not result in a "discharge of a pollutant" (33 U.S.C. 1362(12)) because it did not result in the "addition" of the pollutants to the filled wetlands. Br. 17, 21-24. See CWA § 502(12), 33 U.S.C. 1362(12) (defining a "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source"). That argument is wrong as a matter of fact and as a matter of law.

As the district court specifically found, petitioners' excavation activity resulted in the movement of the earth, rock, sand, and biological matter "both horizontally and vertically." Pet. App. 70. That activity wrenched materials from the uplands beside the wetlands and from the subterranean claypan beneath them, partially or completely filling hydrological features, in many cases leaving them "completely obliterated." *Id.* at 8, 87-92. Under any reasonable conception of the term "addition," petitioners "added" materials to the wetlands, which are now buried beneath the ripped up materials. See, *e.g.*, *id.* at 92 ("soil is mounded along where the water in this part of the feature had flowed"). Indeed, the district court found that petitioners' rippers, in the course of moving earth, rock, sand, and biological matter as they crossed from uplands through waters of the United

States and back again, filled approximately two acres of wetlands. *Id.* at 89, 92, 105.[17]

Petitioners contend that their filling of those wetlands, which are indisputably waters of the United States, should not be viewed as resulting from an "addition" of fill material because their activities merely "turn soil in place while adding nothing and redepositing nothing." Br. 21. According to petitioners, "the plowed soil never loses contact with the immediately-surrounding ground." *Ibid.* The district court, however did not credit petitioners' characterization of their activities. Pet. App. 69- 70. See, *e.g.*, *id.* at 89 ("upper swale portions have been partially filled due to deep rippers plowing to the edge of the feature and depositing soil into the swale").

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[17] The district court's findings of fact extensively document the extent of fill in each wetland area. The following examples illustrate the damage petitioners caused: (1) "Drainage 9 is an approximately 800-foot-long intermittent drainage * * *. It has been completely filled by deep ripping, discing, and the planting of vineyards" (Pet. App. 87); (2) "Drainage 10 is a 1,300-foot-long north/south intermittent drainage * * *. This wetland also has been nearly completely obliterated due to several passes by a deep ripper with its shank down, subsequent discing and planting with vineyards" (*ibid.*); (3) "Drainage 34 * * * has been completely filled after several passes with a fully-engaged deep ripper and subsequent discing and planting with grapes" (*ibid.*); (4) "Drainage 35 * * * has been deep ripped, disced and planted with vineyards. It was approximately 700 feet long and has been completely filled" (*ibid.*); (5) "[D]rainage 36 * * * has been completely filled by deep ripping, discing and planting" (*ibid.*); "[D]rainage 37 * * * also has been completely filled by deep ripping, discing, and planting" (*ibid.*); (6) "[D]rainage 38 * * * has been similarly filled" (*id.* at 87-88); (7) "[D]rainage 40 * * * is filled after deep ripping; * * * the east-west stretch [of this drainage] is currently used as a dirt road" (*id.* at 88); (8) "Drainage 19 * * * ha[s] been partially filled due to deep rippers plowing to the edge of the feature and depositing soil into the swale" (*id.* at 89); (9) "[D]rainage 32 * * * has been deep ripped, disced, and planted. Resultantly, this feature is nearly completely obliterated" (*id.* at 91); (10) "A 103-foot-long portion of drainage 26 has been completely filled and soil is mounded along where the water in this part of the feature had flowed" (*id.* at 92).

The district court's findings regarding horizontal movement of soil into the protected waters is a sufficient reason, by itself, to conclude that the deep ripping activity resulted in an addition for purposes of the Clean Water Act. Nor does it matter whether the fill material was obtained from uplands areas and subterranean strata a few feet away or a few miles away—the hydrological and environmental effects are the same. As the district court found, petitioners' deep ripping activities resulted in precisely the types of harms that Congress sought to address through the Section 404 permitting process. See *Riverside Bayview Homes*, 474 U.S. at 134-139.[18]

Petitioners' suggestion (Br. 24) that a "discharge" does not occur unless the "addition" constitutes "new materials" transported from a distant site cannot be reconciled with the Clean Water Act's terms. For example, the Act defines the term "pollutant" to include "dredged spoil," 33 U.S.C. 1362(6), and specifically regulates the discharge of "dredged * * * materials," 33 U.S.C. 1344(a), which typically involves the excavation and deposition of the spoil within the same water body. See, *e.g.*, *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 923-924 & n.43 (5th Cir. 1983).[19]

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[18] Petitioners filled waters of the United States, impairing and, in many cases, completely destroying those features. Pet. App. 86-92, 105. The district court found in this case that "the damage attributable to [petitioners'] violations, including the diminished effectiveness of these [wetland] features in filtering pollutants in the water system and the decrease in exotic plant and animal life, will accumulate well into the future." *Id.* at 106. The court also found that "[petitioners'] contrary contention that these features have not been significantly affected by the plowing and deep ripping activity is unpersuasive." *Ibid.* The court of appeals credited the district court's findings. *Id.* at 11-12, 17.

[19] Dredged spoil, by definition, consists of material excavated from the bottom of a waterbody or wet area. See *Avoyelles*, 715 F.2d at 924 n.43; 33 C.F.R. 323.2(c) ("dredged material" means "material that is excavated or dredged from waters of the United States"); accord 40 C.F.R. 232.2 (EPA regulations). As a practical matter, "[a] requirement that all pollutants

Similarly, the Act's broad prohibition on the unauthorized discharge of "fill material," 33 U.S.C. 1344(a), contemplates that a wetland can be filled by ripping up the restrictive soil layer that retains the water and depositing the resulting spoil on top of the wetland. As the Corps and EPA have long recognized, filling occurs when material, whatever its source, is used to replace an aquatic area with dry land or to change the bottom elevation of a waterbody. 33 C.F.R. 323.2(e) (1994); 40 C.F.R. 232.2 (1994). See, *e.g.*, *Avoyelles*, 715 F.2d at 924-925 ("significant leveling" resulted in the discharge of "'fill material' into the wetlands"); *United States* v. *Sinclair Oil Co.*, 767 F. Supp. 200, 204 (D. Mont. 1990) (the definition of "fill material" makes no distinction between indigenous and foreign materials).[20]

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must come from outside sources would effectively remove the dredge-and-fill provision from the statute." *Avoyelles*, 715 F.2d at 924 n.43.

[20] Petitioners contend that their deep ripping activities did not result in a discharge of fill material because Corps regulations, until recently amended, defined "fill material" to mean "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [*sic*] waterbody." 33 C.F.R. 323.2(e) (1997). Petitioners contend that the "primary purpose" of their activity was simply "to enhance and revitalize soil for planting new crops." Br. 22. The district court correctly concluded otherwise, finding that petitioners' deep ripping was designed to alter the hydrology of the ripped lands in a way that "destroys the ability of jurisdictional waters to retain water." Pet. App. 70. See *Avoyelles*, 715 F.2d at 924-925 (rejecting defendants' characterization of their landclearing activities, which in fact "chang[ed] the bottom elevation of the waterbody" and "were designed to 'replace the aquatic area with dry land'") (quoting 33 C.F.R. 323.2(e)). Petitioners are also wrong in suggesting (Br. 8, 22) that the court of appeals' decision here is in tension with dicta in its decision in *Resource Invs., Inc.* v. *United States Army Corps of Eng'rs*, 151 F.3d 1162 (9th Cir. 1998), which addressed the relationship between the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, and the Section 404 permitting process. That case involved a solid waste site leak collection system that differs from the fill activities here.

Indeed, even if petitioners' deep ripping activity had truly done no more than remove materials from within a jurisdictional wetland and redeposit them therein, the activity would not be outside the purview of the Clean Water Act. The Fourth Circuit has cogently explained why that is so in *United States* v. *Deaton*, 209 F.3d 331 (2000). The Deatons had hired a contractor to dig a ditch through a wetland area, ignoring advice that they needed to obtain a Section 404 permit. 209 F.3d at 333. The contractor used a bulldozer and other types of heavy machinery to pile dirt on either side of the ditch within the wetland, utilizing a practice known as sidecasting. *Ibid.* When the Deatons refused to comply with the Section 404 permitting process, the government brought a civil suit, and the Deatons challenged the need for a permit on the ground (among others) that the excavation did not result in a discharge of pollutants because there was "no net increase in the amount of material present in the wetland." *Id.* at 335. A unanimous panel of the Fourth Circuit rejected this argument, stating:

> Contrary to what the Deatons suggest, the statute does not prohibit the addition of material; it prohibits "the addition of any pollutant." The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here. In the course of digging a ditch across the Deaton property, the contractor removed earth and vegetable matter from the wetland. Once it was removed, that material became "dredged spoil," a statutory pollutant and a *type* of material that up until then was not present on the Deaton property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that mate-

> rial was excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before.

Id. at 335-336.

The same reasoning applies here. The materials within or beneath the wetlands were not pollutants while in place; they constituted the vegetation, soil, and subterranean claypan that defined the wetlands and sustained their wetland character. Those materials became pollutants when they were ripped out and redeposited within the wetlands, thereby destroying that character.

The court of appeals in this case acknowledged the logic of *Deaton* and correctly recognized that the reasoning applies with equal force to the facts here. Pet. App. 6-8. Indeed, the courts of appeals have consistently recognized that a redeposit of dredged or fill material can result in a discharge of a pollutant. See *Rybachek* v. *EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (dirt and gravel excavated from a streambed for placer mining and then returned there); *United States* v. *M.C.C. of Fla., Inc.*, 772 F.2d 1501, 1503-1506 (1985) (uprooted and redeposited sea bottom material), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part, 848 F.2d 1133 (11th Cir. 1988); *Avoyelles*, 715 F.2d at 923-925 (redeposit of trees and vegetation dug up during land clearing).

Petitioners mistakenly argue (Br. 22) that the reasoning of *National Mining Ass'n* (*NMA*) v. *United States Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998), dictates a different result. *NMA* involved a challenge to a regulation known as the "*Tulloch* Rule," which subjected certain redeposits of dredged material, known as "incidental fallback," to Clean Water Act regulation. *Id.* at 1402. As the court of appeals explained, the term "incidental fallback" describes de minimis redeposits of soil during dredging operations, such as "when a bucket used to excavate material from the

bottom of a river, stream, or wetland is raised and soils or sediments fall from the bucket back into the water." *Id.* at 1402-1403. The court of appeals ruled that the Corps' decision to subject incidental fallback to its permitting requirements exceeded the Corps' authority to regulate the "addition" of "dredged material" into the waters of the United States because "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of United States and a small portion of it happens to fall back." *Id.* at 1403-1404. The court, however, expressly stated:

> [W]e do not hold that the Corps may not legally regulate some forms of redeposit under its §404 permitting authority. We hold only that by asserting jurisdiction over "*any* redeposit," including incidental fallback, the *Tulloch* Rule outruns the Corps's statutory authority.

Id. at 1405. The court specifically distinguished cases such as *Avoyelles* and *Rybachek* as not involving incidental fallback, but rather redeposits that may be regulated. *Id.* at 1406.

The court of appeals in this case correctly concluded that, "[h]ere, the deep ripping does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit." Pet. App. 8 n.2. The court of appeals' conclusion rests solidly on the district court's factual findings. *Id.* at 6-8, 70, 86-92, 105. The *NMA* court itself specifically recognized that activities such as "plowing, ditch maintenance, and the like" are distinguishable from the release of incidental fallback because they "may produce fallback, but they may also produce actual discharges, i.e., additions of pollutants." *Id.* at 1405. *No court* has suggested that activities such as petitioners' deep ripping, which "totally filled" and "completely obliterated" wetlands (Pet. App. 86-

92), would qualify as "de minimis" redeposits. *NMA*, 145 F.3d at 1403.[21]

C. Petitioners' Earthmoving Equipment Is A "Point Source"

Petitioners contend (Br. 24-27) that the court of appeals erred in holding that "plows" may constitute "point sources" (Br. 24-27). The court of appeals correctly rejected petitioners' characterization of the activity involved here, which reflects a misconception of the relevant facts and the controlling legal principles. Pet. App. 8-9.

Section 502(14) of the Clean Water Act defines a "point source" as "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. 1362(14). The definition effectively distinguishes between pollution discharges that reach waters of the United States from specific, readily identifiable sources that can be practicably controlled through the Clean Water Act's permit processes, and pollution discharges that reach those waters from diffuse sources that cannot be effectively regulated through those permit regimes. Cf. *EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976). Classic examples of a "point source" are set out in Section 502(14) and include, but are "not limited to," any

> pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. 1362(14). The Clean Water Act uses, but does not define, the term "nonpoint source." CWA §§ 208, 319, 33 U.S.C. 1288, 1329. The textbook examples, however, are various forms of runoff, which reach waterbodies by flowing over or percolating through topographical features. See, *e.g.*, Robert Percival et al., *Environmental Regulation* 630 (3d ed. 2000); *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002) ("Nonpoint sources of pollution are non-discrete sources; sediment run-off from timber harvesting, for example, derives from a nonpoint source.").

The deep ripping equipment that petitioners employed—bulldozers or tractors pulling 4-to-7 foot long metal shanks that wrench out soil that is dragged behind the ripper (Pet. App. 3, 35-36, 69-70)—falls squarely within the plain meaning of a "point source." As the district court found, petitioners employed that earthmoving equipment to penetrate, break up, and remove subterranean claypan, moving the disgorged material "both horizontally and vertically" and depositing it in wetlands. *Ibid.*; *id.* at 8-9, 86. That earthmoving equipment is "discernible, confined and discrete," 33 U.S.C. 1362(14), because it is readily identifiable, it occupies a specific physical space, and it is separate, and therefore distinguishable, from other sources of pollutants. It presents none of the definitional difficulties that remove nonpoint sources, such as sediment from timber harvesting or agricultural stormwater runoff, from permitting requirements. The deep ripping equipment is furthermore a "conveyance" from which pollutants are discharged. *Ibid.* It moves earth, rock,

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[21] Undaunted by the lower courts' rejection of their claim that deep ripping involves mere incidental fallback, petitioners now argue before this Court that "[n]ot even 'incidental fallback'" occurred here. Br. 21. Petitioners raise the new argument that deep ripping does not involve incidental fallback on the theory that there is no redeposit if the soil moved by deep ripping "never loses contact with the immediately-surrounding ground." *Ibid.* That argument is foreclosed because the district court made no such finding of continuous contact, and petitioners not only did not present the argument to the court of appeals, but they advanced a contradictory argument. See Appellants' C.A. Br. 4, 23 ("'deep ripping' ranchland to plant deeper-rooted crops (i.e., vineyards and orchards) involves only 'incidental fallback'," "Plowing Ranchland Produces Only 'Incidental Fallback'"). In any event, petitioners' contention is wrong. The question of "contact" is irrelevant. For example, a bulldozer grading a wetland pushes around dirt, and that dirt also maintains contact with the immediately surrounding dirt. But the dirt is still fill material, is still being redeposited, and is still a discharge.

sand, and biological matter "both horizontally and vertically" from upland and subterranean features, thereby filling the wetland. Pet. App. 3, 8-9, 69-70, 86.

The deep ripping equipment at issue here is not meaningfully distinguishable from other types of earthmoving equipment, such as dredges, graders, front-loading bulldozers, and backhoes, that dig up, transport, and deposit fill material. The courts have consistently and uniformly treated such equipment as point sources. See Pet. App. 8-9, 39-40; *Deaton*, 209 F.3d at 333 (sidecasting through the use of a backhoe, front-end loader, and bulldozer); *United States* v. *Akers*, 785 F.2d 814, 817-820 (9th Cir.) (site preparation using a grader, tractor pulling discs, and a ripper), cert. denied, 479 U.S. 828 (1986); *Avoyelles*, 715 F.2d at 922 (landclearing using bulldozers and backhoes); see also *In re Alameda County Assessor's Parcels*, 672 F. Supp. 1278, 1284-1285 (N.D. Cal. 1987)(same); *United States* v. *Larkins*, 657 F. Supp. 76, 78 n.2, 85 (W.D. Ky. 1987) (same).[22]

[22] In their reply brief at the petition stage, petitioners claimed that "[t]he government's statement that *Akers* involved "rippers" is **false**." Pet. Reply Br. 4 (emphasis in original). Petitioners' accusation is incorrect. The district court's decision in *Akers* makes clear that a ripper was used:

> Various sections of the southern wetlands were disced with farm equipment. Prior to the discing, the areas were ripped with a chisel plow (or "ripper") which was used to slice through the soil so that the discing would more effectively pulverize the soil.

United States v. *Akers*, 15 Envtl. L. Rep. (Entl. L. Inst.) 20,243, 20,244 (E.D. Cal. Jan. 11, 1985), aff'd, 785 F.2d 814 (9th Cir.), cert. denied, 479 U.S. 828 (1986). That court issued a preliminary injunction enjoining the defendant's dredge and fill activities, declining his invitation "to look at each of his earth-moving activities individually." *Id.* at 20,245, 20,248. The court of appeals affirmed that injunction. 785 F.2d at 823. Thus, the government correctly characterized the facts in *Akers*. Indeed, the government had informed petitioners of *Akers*' facts in its brief in the court of appeals, quoting the indented language from the district court's decision. See Gov't C.A. Br. 22 n.11.

Petitioners contend that the equipment at issue here is merely a "plow" and that a plow does not qualify as a "point source" because it lacks the "ability to *confine*, *contain*, and *concentrate*, and then to *carry* and *convey*" pollutants "from one discrete location to another." Br. 25 (emphasis in original). But the equipment at issue here is not a yeoman's "plow" that might be pulled by "horses and oxen" (Br. 26-27), but rather powerful industrial earthmoving machinery. Petitioners do not dispute that "*bulldozers* and *backhoes*" or other equipment used for "major earthmoving, excavation, and ditching functions" may constitute point sources. Br. 26. Instead, they would have this Court draw an arbitrary distinction between heavy equipment that moves earth by pushing a "grading blade" or lifting a "bucket," and essentially identical heavy equipment that moves earth by dragging a "deep plow shank[]" from behind. Br. 25-26, 27.

More fundamentally, the test is not whether the operational ripper has the "ability" to "confine, contain and concentrate" pollutants (Br. 25), but rather whether it *is* a "discernible, confined and discrete conveyance" that discharges pollutants into wetlands. See CWA § 502(14), 33 U.S.C. 1362(14). The rippers in this case meet that test. They are not disqualified simply because they do not possess other immaterial characteristics of other point sources that are designed to convey other types of materials—such as gases, liquids, or slurries—through other means.[23]

[23] Petitioners also characterize the longstanding regulatory distinction between discharges from earthmoving equipment and discharges from agricultural runoff as "the height of irrationality." Br. 26. To the contrary, Congress's exclusion of agricultural stormwater runoff and irrigation return flows from the definition of "point source" aptly illustrates the difference Congress discerned between point source discharges that may be regulated through the Clean Water Act's permitting processes, and other pollution discharges that Congress intended to be addressed through other means, such as the Section 208(b) areawide waste treat-

D. Section 404(f) Indicates That Even Ordinary Plowing May Result In The Discharge Of Pollutants

The Clean Water Act's "normal farming" exemption, Section 404(f), demonstrates that even ordinary plowing may result in the "discharge of a pollutant" that is subject to regulation under Section 404. Section 404(f)(1)(A) creates a limited exemption from the Section 404 permitting requirements for "normal farming, silviculture, and ranching activities" including "plowing, seeding, cultivating," and other listed farming activities. 33 U.S.C. 1344(f)(1)(A). If farming activities such as plowing never result in a discharge of a pollutant for purposes of the Clean Water Act, as petitioners assert (Br. 17), there would be no need to create an exemption for them. See *Minnehaha Creek Watershed Dist.* v. *Hoffman*, 597 F.2d 617, 626 (8th Cir. 1979) (A similar exemption for maintenance or emergency reconstruction, set out at Section 404(f)(1)(B), "would be necessary only if such work is generally subject to § 404 permitting requirements.").

Section 404(f)(2)'s specific delineation of conditions under which discharges from normal farming activities may still require a Section 404 permit provides still further proof that Congress understood that those activities could cause discharges of dredged or fill material. 33 U.S.C. 1344(f)(2). If petitioners are correct that farming activities cannot produce discharges, then they could not be recaptured in this manner. Accordingly, Section 404(f)(2) expresses the clear understanding that even "normal" farming activities remain potentially subject to regulation as point source discharges. It follows, a fortiori, that the extraordinarily destructive activity in which petitioners engaged here also is subject to such regulation.

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ment management planning process. See 33 U.S.C. 1288(b)(2)(F); see also CWA § 319, 33 U.S.C. 1329.

Petitioners rely heavily on statements from individual legislators (Br. 36-39) in support of their assertion that Congress did not mean what it said when it indicated that even "normal" farming is potentially subject to regulation. But the best evidence of congressional intent "is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous * * * we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98-99 (1991). See, *e.g.*, *United States* v. *Gonzales*, 520 U.S. 1, 8 (1997) ("[w]here there is no ambiguity in the words, there is no room for construction" (quoting *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.)). In any event, the legislative history reinforces what is manifest from the text itself: even normal farming activities can result in regulated discharges. See, *e.g.*, note 4, *supra*.[24]

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[24] There is no merit to petitioners' suggestion that the 1972 Amendments did not reach agricultural discharges. See, *e.g.*, H.R. Rep. No. 95-139, *supra*, at 23 (recognizing, in proposing a precursor of Section 404(f), that "[u]nder the existing section 404 program given its broadest reach, all matters of agricultural and forestry activities could be subject to Federal permit regulation"). Congress enacted Section 404(f), as part of the 1977 Amendments, based on its conclusion that a carefully circumscribed agricultural exemption was warranted. Congress could have adopted language that broadly exempted all farming activities from the definition of a discharge of a pollutant, or from the definition of a point source, as it did in the case of agricultural stormwater discharges and irrigation return flows. But Congress elected not to do so. It could also have phrased the Section 404(f) exemption more broadly, or it could have elected not to include the recapture provision. Indeed, it considered such approaches in crafting the 1977 Amendments. See, *e.g.*, 4 *Leg. His.* 623-624 (proposed Senate bill), 1159-1160 (proposed House bill), 1343 (proposed amendment of Rep. Edgar). But Congress ultimately settled on Section 404(f) as enacted, which limits the normal farming exemption to "narrowly defined activities that cause little or no adverse effects either

II. SECTION 404(f) DOES NOT EXEMPT PETITIONERS' DEEP RIPPING FROM THE SECTION 404 PERMITTING PROCESS

Petitioners contend (Br. 31-46) that their activities fell within the Section 404(f) conditional exemption for normal farming activities. 33 U.S.C. 1344(f). The courts of appeals have uniformly recognized that, to qualify for the conditional exemption, one must demonstrate "that proposed activities both *satisfy* the requirements of Section 404(f)(1) and *avoid* the recapture provision of Section 404(f)(2)." *United States* v. *Brace*, 41 F.3d 117, 124 (3d Cir. 1994), cert. denied, 515 U.S. 1158 (1995); see *Akers*, 785 F.2d at 819; *Avoyelles*, 715 F.2d at 925. The courts of appeals have also uniformly held that Congress intended the courts to apply the normal farming exemption, as well as other exemptions under Section 404(f)(1), as "narrow" exceptions to the generally applicable permitting requirements. *Brace*, 41 F.3d at 124, 125; *Akers*, 785 F.2d at 819; *United States* v. *Huebner*, 752 F.2d 1235, 1240-1241 (7th Cir.), cert. denied, 474 U.S. 817 (1985); *Avoyelles*, 715 F.2d at 925 n.44.

The district court held that the discharges from petitioners' deep ripping required a Section 404 permit for two reasons. First, they did not satisfy the requirements of Section 404(f)(1)(A), 33 U.S.C. 1344(f)(1)(A). Pet. App. 42-47. In particular, the district court held that petitioners' activities did not meet the regulatory description of a "normal" farming activity or the regulatory definition of "plowing." *Ibid.* Second, even if they had, petitioners' activities were recaptured under Section 404(f)(2), because it was undisputed that petitioners sought to convert use of the area from cattle ranching to vineyard and orchard cultivation and that the deep ripping for that purpose impaired the flow or circulation of

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individually or cumulatively." 3 *Leg. His.* at 474 (Sen. Muskie). See note 4, *supra*.

and reduced the reach of wetlands to the point that they ceased to exist. *Id.* at 47-49. The court of appeals found it unnecessary to reach the question whether petitioners engaged in normal farming within the meaning of Section 404(1)(1)(A), concluding that their activities clearly fell within the recapture provision of Section 404(f)(2). See *id.* at 9-10.

A. Petitioners' Deep Ripping Did Not Satisfy The Requirements Of Section 404(f)(1)

Congress has charged EPA and the Corps with responsibility for implementing the Clean Water Act, including the Section 404 permitting program. See CWA § 101(d), 33 U.S.C. 1251(d). Congress has also granted the Corps, implicitly, and EPA, explicitly, the power to issue regulations for administering the Act's provisions. See CWA §§ 404, 501(a), 33 U.S.C. 1344, 1361(a). In accordance with Congress's expectations, those agencies have issued regulations, after notice and comment, delineating the scope of the exemption for "normal" farming. CWA § 404(f), 33 U.S.C. 1344(f).[25]

The regulations provide that, to qualify as "normal" farming, the activity "must be part of an established (i.e., ongoing) farming * * * operation. * * * An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long

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[25] Petitioners assert that Congress has defined the scope of "normal" farming. Br. 32, n.20. Congress, however, has not provided definitions of Section 404(f)'s operative terms, such as "normal" or "plowing." Instead, Congress recognized that the scope of any farming exemption "must be defined in regulations." 4 *Leg. His.* 709 (S. Rep. No. 95-370, *supra*, at 76). Petitioners also make much of the Corps' regulations from 1975 and July 1977 (Br. 5-6), before Congress enacted the 1977 Amendments in December 1977. But Congress did not adopt the Corps' prior approach to regulating agricultural activities when it adopted Section 404(f). The Corps recognized that fact and proposed new regulations, 45 Fed. Reg. 62,732 (1980), which were later promulgated in final form, 51 Fed. Reg. 41,232 (1986), long before the events at issue here.

that modifications to the hydrological regime are necessary to resume operation." 33 C.F.R. 323.4(a)(1)(ii); see 40 C.F.R. 232.3(c)(1)(ii). The courts of appeals have long recognized and applied the agency's interpretation. See *Brace*, 41 F.3d at 124- 125; *Akers*, 785 F.2d at 819.[26]

The question, accordingly, is whether petitioners' activities "were within the meaning of the statutory term 'normal farming activities' as defined by the regulations." Pet. App. 45 (quoting *Brace*, 41 F.3d at 127). The district court correctly concluded that they were not. Prior to petitioners' purchase of Borden Ranch in 1993, there was no ongoing farming operation on the areas at issue in this case. See pp. 11-12 & n.8, *supra*. Rather, Borden Ranch had "primarily been used as rangeland for the grazing of cattle." Pet. App. 44. Although portions of Borden Ranch not at issue here had previously been used "for the production of wheat, beets, tomatoes, beans, and corn since approximately 1940, upland crop production has not occurred on a regular basis." *Ibid.* Indeed, petitioners admitted that the land at issue "must be deep ripped and disked before it will be suitable for planting vineyards and orchards." *Ibid.* As the district court observed:

> In other words, even if the subject wetlands and other waters on Borden Ranch were previously farmed, "modifications to the hydrological regime are necessary" to enable [petitioners] to now plant orchards and vineyards. This evinces that [petitioners'] activities are not part of an established farming operation.

[26] The interpretation of EPA and the Corps coincides with the ordinary meaning of "normal." See *Webster's Third New International Dictionary* 1540 (1993) (defining "normal," in its most relevant sense, as "according to, constituting, or not deviating from an established norm, rule, or principle: conformed to a type, standard; regular"). That long-standing regulatory interpretation is, of course, entitled to deference. See *Riverside Bayview Homes*, 474 U.S. at 131; *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); Pet. App. 45.

Id. at 45 (quoting 33 C.F.R. 323.4(a)(1)(ii); 40 C.F.R. 232.3(c)(1)(ii)(B)).[27]

Furthermore, petitioners' deep ripping also fails to satisfy the Section 404(f)(1)(A) exemption because it did not constitute "plowing" as that term is defined in the Corps and EPA regulations:

> *Plowing* means all forms of primary tillage, including moldboard, chisel, or wide blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. *The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land.* For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. * * * Plowing as described above will never involve a discharge of dredged or fill material.

33 C.F.R. 323.4(a)(1)(iii)(D) (emphasis added); see 40 C.F.R. 232.3(d)(4) (same).[28]

Petitioners and their amici generally elide the emphasized language when quoting the provision. See Br. 4, 18, 42; Am. Farm Bur. Fed'n Br. 18; Cal. Farm Bur. Fed'n Br. 22 n.31.

[27] Significantly, petitioners themselves submitted a declaration from the prior owners of Borden Ranch stating that, aside from approximately 1200 acres of "bottom ground" along Dry Creek, which is not at issue here, "[t]he balance of the land was used as rangeland to graze cattle" in the 50-plus years they owned the property before Tsakopoulos purchased it. SER 76.

[28] The regulatory definition of "plowing" applies, of course, to the use of that term in other related regulatory provisions. For example, the Corps' definition of "discharge of fill material" states, among other things, that "[t]he term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber and forest products (See § 323.4 for the definition of these terms)." 33 C.F.R. 323.2(f).

The emphasized passage, however, has central relevance to this case. The district court expressly found that petitioners' deep ripping—even if euphemistically characterized as mere "plowing"—redistributed "earth, rock, sand, and biological matter," Pet. App. 70, converting waters of the United States into dry land, *id.* at 86-92, 106. Although petitioners and their amici imply that deep ripping is an innocuous activity, it can completely destroy wetlands, and it did so in this case. *Ibid.*[29]

The court of appeals affirmed the district court's findings, Pet. App. 11-12, and those findings should not be open to further dispute here. *E.g.*, *Ceccolini*, 435 U.S. at 273; *Graver Tank*, 336 U.S. at 275. Thus, petitioners' activities fall outside of the regulatory definition of "plowing" and outside of the Section 404(f)(1)(A) exemption.[30]

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[29] Indeed, petitioners submitted a declaration below stating that, before development of machinery powerful enough to pull the rippers through the earth at the requisite depth, ER 453, "some areas were blasted to remove the hardpan in order for deep rooted crops to be grown." Cook Decl. ¶ 5(b).

[30] Petitioners contend (Br. 6, 43) that the Corps adopted a broader definition of "plowing" through a Regulatory Guidance Letter (RGL) dated February 11, 1986, that they have lodged with the Clerk of the Court. See Add., *infra*, 12a-13a. But the RGL, which explicitly states that "[n]ot all activities involving the use of a plow, disc, or similar equipment will satisfy the definition of plowing," reiterates the definition of "plowing" set forth in 33 C.F.R. 323.4(a)(1)(iii)(D). Add., *infra*, 12a. At the same time, petitioners attack (Br. 10-11, 44) a joint Corps and EPA "Memorandum To The Field," dated December 12, 1996, which specifically discussed the applicability of Section 404(f) to deep ripping. Add., *infra*, 14a-21a. The Memorandum advised agency field personnel on the agencies' application of Section 404(f) to deep ripping activities, tracking Section 404(f) and the agencies' regulations. *Ibid.* The agencies properly issue such memoranda to provide guidance to their field personnel about the application of pertinent regulations to recurring factual situations. As petitioners acknowledge (Br. 44 n.25), the interpretations articulated therein are entitled to the Court's respect to the extent that they have the "power to persuade." *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). In this case, the district court had no occasion to rely on the Memorandum. Pet. App. 4 n.1, 30 n.2. It also found that petitioners had notice beginning in 1993—long before the Memorandum issued—that their activities were subject to Section 404's permitting requirements. *Id.* at 71.

B. Petitioners' Deep Ripping Is Subject To The Recapture Provisions Of Section 404(f)(2)

Even if petitioners' deep ripping satisfied the requirements of Section 404(f)(1)(A), that activity would be subject to the "recapture" provisions of Section 404(f)(2). See 33 U.S.C. 1344(f). The recapture provisions require a person to obtain a Section 404 permit if (a) the person engages in a "normal" farming activity "having as its purpose bringing an area of navigable waters into a use to which it was not previously subject," and (b) as a consequence of a resulting discharge of dredged or fill material, "the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. 1344(f)(2). The court of appeals correctly concluded that those conditions are satisfied here.

The district court found that petitioners "s[ought] to convert use of their land from ranching and grazing cattle to growing vineyards and orchards." Pet. App. 47. Furthermore, petitioners conceded "that the land must be deep ripped and disked before it will be suitable for planting vineyards and orchards." *Id.* at 44. Petitioners quite plainly instituted their deep ripping activities to bring the area, including the wetlands at issue in this case, into a use to which they were not previously subject. Indeed, by the time of trial, some of the wetlands in question had been completely converted to dry land and had already been planted with vineyards. *Id.* at 87-88, 91.[31]

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[31] Petitioners suggest (Br. 10, 19, 33) that the wetlands in question had been used to grow crops before they were deep ripped, but the district court made no such finding, and there is no evidence in the record that crops were grown on those areas or that they had been plowed in any way for at least a half-century before petitioners purchased them. Pet. App. 44; SER 76. The only portions of the Borden Ranch cultivated for crops before petitioners' purchase lie along Dry Creek; they were not deep

The district court also found that petitioners' deep ripping for the purpose of land use conversion resulted in discharges of dredged and fill material that impaired the flow or circulation of the wetlands and reduced their reach, to the point that they have been severely impaired or completely filled. Pet. App. 48, 87-92. The court of appeals agreed, noting that petitioners had "radically altered the hydrological regime of the protected wetlands." *Id.* at 10. Accordingly, both courts correctly concluded "that the deep ripping at issue in this case is governed by the recapture provision" and therefore subject to Section 404's permitting requirements. *Ibid.*; see *id.* at 47-49.

Petitioners principally argue that Section 404(f)(2) applies only if the farming activity in question is "merely 'incidental' to some other activity whose purpose is to convert waters to an upland use to which they were not previously subject." Br. 19; see Br. 33. But that is not what Section 404(f)(2) says. Section 404(f)(2) addresses "discharge[s] of dredged or fill material" that are "incidental" to the "activity" in question. That "activity" is, of course, the "normal farming * * * activit[y]" that would otherwise be exempt from the permitting requirement. See *Commissioner* v. *Lundy*, 516 U.S. 235, 250 (1996) (invoking the statutory canon that "identical words used in different parts of the same act are intended to have the same meaning"). Petitioners' argument (which they did not raise in the court of appeals) ignores the plain terms of the statute. Section 404(f) says nothing about recapturing a "normal" farming activity only when it is "incidental" to some other unidentified activity that produces still greater harm. Moreover, petitioners ignore that Section

ripped and are not at issue here. See notes 8 & 27, *supra*. Instead, the area in question was used primarily as rangeland for grazing cattle. Pet. App. 44. Furthermore, the district court did not find, and nothing in the record would support an assertion, that cattle grazing continued in those areas after they were converted to vineyards.

404(f)(1), which creates the exemption for normal farming activity, begins with the phrase "Except as provided in paragraph (2) of this subsection" (33 U.S.C. 1344(f)(1)), thus reinforcing that Section 404(f)(2)'s exception to the exemption does indeed apply to normal farming activity, contrary to the thrust of petitioners' argument.[32]

Petitioners characterize the court of appeals as having ruled that Section 404(f)(2)'s recapture provision would apply to any alteration of the hydrology of a wetland. Br. 19, 35. That is not so. The court of appeals and the district court each reached their conclusion based on an application of Section 404(f)(2)'s specific requirements to the facts of this case. They did not suggest, as petitioners and their amici contend, that "*any* change in agricultural crop or practice—even plowing crop land to lie fallow—would bring any kind of plowing within federal regulation." Br. 35; see Am. Farm Bur. Fed'n Br. 10; Ca. Farm Bur. Fed'n Br. 16. To the contrary, the court of appeals explicitly stated that Section 404(f)(2) would not recapture the activities of a

[32] In yet another new argument, petitioners suggest that the recapture provision should apply only if the wetland at issue is brought "into a use to which it was not previously subject" (33 U.S.C. 1344(f)(2)) in the sense that the wetland was not "capable of or amenable to" the new use "in its natural condition." Br. 34. In other words, Section 404(f)(2) would allow the filling of a wetland if the wetland had not been, but could have been, put to the new use without being filled. See *ibid.* There is no reason to think, however, that Congress intended to allow filling of wetlands so long as the wetlands did not need to be filled. See 3 *Leg. His.* 474 (statement of Sen. Muskie). Neither the Corps nor EPA, or any court, has endorsed the counter-intuitive notion that wetlands may be destroyed so long as the destruction is gratuitous. In any event, petitioners have already admitted that the area in question in this case was not suitable for planting vineyards and orchards "in its natural condition" (Br. 34) without deep ripping and its concomitant conversion of wetlands to dry land. See Pet. App. 44-45, 48. The argument, therefore, appears to be merely a variant, in a new guise, of petitioners' contention that deep ripping does not result in the "addition" of pollutants to the filled wetlands. See pages 25-32, *supra* (responding to that contention).

farmer seeking to change from one wetland crop to another. Pet. App. 10.

Petitioners' related claim (Br. 35-36) that the lower courts' ruling would preclude plowing historically ranched land for the first time to improve the forage or to plant crops is also incorrect. The agencies' regulations allow many types of agricultural activity, including "plowing" as that term is defined in the agencies regulations. See 33 C.F.R. 323.4(a)(1)(iii)(D); 40 C.F.R. 232.3(d)(4). In this case, however, petitioners engaged in deep ripping that changed the use of wetlands and incontrovertibly converted them to dry land. The courts below correctly concluded that Section 404(f)(2) does not allow *that* activity without a permit.[33]

The lower court rulings in this case reflect long settled law. The courts of appeals have consistently held that converting from one type of use to another—*e.g.*, from pasturing of cattle and horses to cropping operations, from silviculture to soybean production, or from wetlands farming to dryland farming—can subject the activities in question to recapture under Section 404(f)(2) if those activities result in significant changes to the hydrology of protected waters. See *Brace*, 41 F.3d at 129 (wetlands to dryland farming); *Akers*, 785 F.2d at 822-823 (same); *Huebner*, 752 F.2d at 1240 (cranberries to barley, corn and other dryland crops); *Avoyelles*, 715 F.2d at 925 (forest to soybean production). Those decisions demonstrate that the courts have followed an intensely factual, case-by-case approach in determining the application of Section 404(f)(2). The lower courts here followed that approach and correctly recognized, consistent with the statute and

[33] Petitioners also claim, based on provisions in the Food Security Act of 1985, that "plowing" is not a wetland conversion activity. Br. 34 n.21. Petitioners, however, have previously acknowledged below that the Food Security Act is not applicable here. ER 431 n.14. Even if that Act were otherwise applicable, petitioners' deep ripping falls under 16 U.S.C. 3822(b)(1)(D), because it "destroy[ed] a natural wetland characteristic."

settled law, that the deep ripping that occurred here was not exempt from Section 404's permitting requirements.

III. THE LOWER COURTS CORRECTLY CALCULATED THE MAXIMUM CIVIL PENALTY

The district court properly determined petitioners' civil penalty for discharging dredged and fill material without a permit in accordance with Section 309(d) of the Clean Water Act, 33 U.S.C. 1319(d), which provides that the maximum civil penalty shall be calculated by multiplying the maximum penalty amount for each violation by the number of individual violations. See Pet. App. 16, 102-104. The court of appeals affirmed the district court's "careful analysis of the penalty issue on the facts of this case," noting that the penalty was "significantly lower than the statutory maximum," and remanded only for a determination of "what, if any, reduction in the penalty is appropriate" with regard to the vernal pool withdrawn from the case. *Id.* at 16, 17.

Section 309(d) provides that any person who violates Section 301 of the Clean Water Act "shall be subject to a civil penalty not to exceed $25,000 per day for each violation" and specifies several factors to be considered in determining the ultimate penalty amount. 33 U.S.C. 1319(d). It explicitly recognizes that a single violation—such as a continuous discharge of a pollutant from an outfall—may persist over a long period of time and, in that situation, imposes a penalty of $25,000 per day. In this case, the district court noted that "[t]he parties apparently agree that each pass [of a ripper] constitutes a separate violation," Pet. App. 103, and it accordingly counted the number of times a deep ripper passed through protected waters and multiplied that number by $25,000, arriving at a maximum statutory penalty of $8,950,000. *Id.* at 103-104. That court also stated that "the day on which a discharge occurred is the only day that will be counted in determining the maximum penalty." *Id.* at 102-103. It then analyzed the factors identified in Section

309(d) and reduced that amount to $1.5 million, giving petitioner Tsakopoulos the option, which he ultimately chose, to reduce the penalty even further to $500,000, provided that he agree to undertake restoration of four acres of wetlands. See *id.* at 104-118, 129.

In the court of appeals, petitioners did not challenge the district court's determination that each pass of a deep ripper through a protected wetland constituted a separate violation. Rather, they contended that Section 309(d) provides a maximum daily penalty amount, regardless of the number of violations that occur on each day. See Appellants' C.A. Br. 57 ("This statute contemplates maximum penalties will be calculated not in terms of the total number of individual violations of the same type, but, rather, in terms of *daily violation units.*"); Gov't C.A. Br. 51. The court of appeals correctly rejected that argument. Pet. App. 13-16. Contrary to petitioners' contentions (Br. 46-50), Section 309(d) states that a maximum penalty of $25,000 shall be imposed "per day for each violation," 33 U.S.C. 1319(d)—not "per day for each category of violation" or "per daily violation unit." As the court of appeals observed, "[t]he focus is clearly on *each* violation, and courts have consistently rejected attempts to limit civil penalties to the number of days in which violations occur." Pet. App. 13.

Indeed, Congress specifically resolved this question in the 1987 Amendments. See Pub. L. No. 100-4, § 313(b)(1), 101 Stat. 45; p. 8, *supra.* Prior to February 3, 1987, Section 309(d) stated that violators "shall be subject to a civil penalty not to exceed $10,000 per day of such violation." Some courts took the view that this language required a cap on total penalties of $10,000 per day. In response, Congress amended Section 309(d) to its current form, not only to increase the daily maximum, but "to clarify that each distinct violation is subject to a separate daily penalty assessment of up to $25,000." H.R. Rep. No. 99-1004, at 132 (1986). Petitioners' interpretation would put in place the erroneous interpretation that Congress rejected and would effectively remove "for each violation" from the statutory text.

As the Eleventh Circuit correctly stated in *Atlantic States Legal Found., Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128 (1990), "there is no daily cap of $25,000," and "*each* excessive discharge of a pollutant on a given day will subject the polluter to a $25,000 maximum fine." *Id.* at 1139. The court of appeals correctly followed that approach here. As that court recognized, if petitioners' contrary approach were adopted, a defendant who committed multiple violations on a single day would be subject to the same maximum penalty as someone who committed only a single violation. Pet. App. 13. See *United States* v. *Smithfield Foods, Inc.*, 191 F.3d 516, 527-528 (4th Cir. 1999) (noting that the construction petitioners propose here would create a "strong disincentive" to discontinue violations), cert. denied, 531 U.S. 813 (2000).

Petitioners' reliance (Br. 47-48) on *Chesapeake Bay Found., Inc.* v. *Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), is misplaced. This Court vacated that decision, 484 U.S. 49 (1987), and, in any event, it discusses a version of Section 309(d) that is no longer in force. The statutory provision at issue here—imposing a penalty of "$25,000 per day for each violation"—did not come into effect until 1987. *Tyson Foods*, 897 F.2d at 1138-1139. Moreover, the court in *Chesapeake Bay Foundation* explicitly declined to reach the question presented in this case. See Pet. App. 13-14.[34]

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[34] Petitioners also invoke the rule of lenity (Br. 49) in support of their interpretation of Section 309(d), which is a statutory provision that, on its face, can have only civil application. This Court has never applied the rule of lenity to that situation. See *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 704 n.18 (1995). Moreover, even in the criminal context, the "mere possibility of articulating a narrower

Contrary to petitioners' contention (Br. 49-50), the court of appeals identified a "logical stopping point" for determining the maximum civil penalty. It is the number of violations multiplied by the maximum penalty that can be assessed for each violation. In any event, the maximum civil penalty is only a benchmark. The district courts have discretion to impose a civil penalty that is less than the statutory ceiling, based upon the various factors set forth in Section 309(d). See *Tull* v. *United States*, 481 U.S. 412, 427 (1987) (Clean Water Act penalties are "highly discretionary"). The district court acted well within its discretion in this case.[35]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2002

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construction * * * does not by itself make the rule of lenity applicable." *Smith* v. *United States*, 508 U.S. 223, 239 (1993).

[35] Indeed, even if petitioners' theory of calculating the maximum penalty were accepted, the evidence in the record would support a penalty of at least $1,825,000 (73 days of ripping multiplied by $25,000), well above the $500,000 penalty that petitioner Tsakopoulos was ultimately assessed. SER 30, 33-67, 260-275 (invoices and time records of David T. Price, Inc., deep ripping operator).

ADDENDUM

A. Pertinent Provisions of the Clean Water Act

Section 301, 33 U.S.C. 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * * * *

Section 309, 33 U.S.C. 1319. Enforcement

* * * * *

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State,,[1] or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit

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[1] So in original.

(if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

* * * * *

Section 404, 33 U.S.C. 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * * * *

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material–

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

* * * * *

Section 502, 33 U.S.C. 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

* * * * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * * * *

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

* * * * *

B. Pertinent Regulations of the Army Corps of Engineers

33 C.F.R. 323.2 Definitions.

* * * * *

(c) The term *dredged material* means material that is excavated or dredged from waters of the United States.

* * * * *

33 C.F.R. 323.2 Definitions. [1994]

* * * * *

(d)(1) Except as provided below in paragraph (d)(2), the term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following:

* * * * *

(iii) any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

* * * * *

(e) The term *fill material* means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act. See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

(f) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

33 C.F.R. 323.4 Discharges not requiring permits.

(a) *General.* Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an

established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been coverted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

(iii) * * * *

(D) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

C. Pertinent Regulations of the Environmental Protection Agency

40 C.F.R. 232.2 Definitions. [1994]

* * * * *

Discharge of dredged material. (1) Except as provided below in paragraph (2), the term *discharge of dredged material* means any addition of dredged material into, including any redeposit of dredged material within, the waters of the United States. The term includes, but is not limited to, the following:

* * * * *

(iii) Any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

* * * * *

Discharge of fill material. (1) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities,

intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

* * * * *

Dredged material means material that is excavated or dredged from waters of the United States.

* * * * *

Fill material means any "pollutant" which replaces portions of the "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose.

40 C.F.R. 232.3 Activities not requiring permits.

* * * * *

(c) The following activities are exempt from section 404 permit requirements, except as specified in paragraphs (a) and (b) of this section:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (d) of this section.

(ii)(A) To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

(B) Activities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in

which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it was part of an established farming, silviculture or ranching operation.

* * * * *

(d) For purpose of paragraph (c)(1) of this section, cultivating, harvesting, minor drainage, plowing, and seeding are defined as follows:

* * * * *

(4) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing, as described above, will never involve a discharge of dredged or fill material.

D. 1986 Regulatory Guidance Letter

Regulatory Guidance Letter 86-01

SUBJECT: Exemptions to CWA-Plowing

DATE: February 11, 1986 [LOGO]

EXPIRES: December 31, 1988

1. The purpose of this guidance is to clarify the applicability of Section 404 to plowing.

2. Since 1975, Corps regulations have excluded "plowing . . . for production of food, fiber, and forest products" from the definition of a discharge of dredged or fill material (33 CFR 323.2(j) and (1)). "Plowing" is defined in 33 CFR 323.4(a)(1)(iii)(D).

3. Plowing for the purpose of producing food, fiber, and forest products and meeting the definition in Section 323.4 will never involve a discharge of dredged or fill material. Such plowing is not subject to any of the provisions of Section 404 including the Section 404(f) exemption limitations. Section 404(f) is applicable to those activities that do involve a discharge but are statutorily exempted from the need to obtain a 404 permit.

4. Not all activities involving the use of a plow, disc, or similar equipment will satisfy the definition of plowing. For example, using a plow to dry the surface of a peat bcg to facilitate mining is not plowing since it is not for the purpose of producing food, fiber or forest products. Also, the use of a plow to divert a braided stream feeding a wetland is not plowing because the purpose is to change a water of the United States to dry land. Thus, these activities are regulated under Section 404 if they occur in a water of the United States.

5. This guidance expires 31 December 1988 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS:

E. 1996 Memorandum To The Field

[SEAL] **Department of the Army** [LOGO]
U.S. Army Corps of Engineers

United States Environmental Protection Agency

12 DEC 1996

MEMORANDUM TO THE FIELD

SUBJECT: Applicability of Exemptions under Section 404(f) to "Deep-Ripping" Activities in Wetlands

PURPOSE: The purpose of this memorandum is to clarify the applicability of exemptions provided under Section 404(f) of the Clean Water Act (CWA) to discharges associated with "deep-ripping" and related activities in wetlands.[1]

BACKGROUND:

1. Section 404(f)(1) of the CWA exempts from the permit requirement certain discharges associated with normal farming, forestry, and ranching practices in waters of the United States, including wetlands. Discharges into waters subject to the Act associated with farming, forestry, and ranching practices identified under Section 404(f)(1) do not require a permit except as provided under Section 404(f)(2).

2. Section 404(f)(1) does not provide a total, automatic exemption for all activities related to agricultural, silvicultural, or ranching practices. Rather, Section 404(f)(1) exempts only those activities specifically identified in paragraphs (A) through (F), and "other activities of essentially the same character as named" [44 FR 34264]. For example, Section

[1] As this guidance addresses primarily agricultural-related activities, characterizations of such practices have been developed in consultation with experts at the U.S. Department of Agriculture (USDA), Natural Resources Conservation Service.

404(f)(1)(A) lists discharges of dredged or fill material from "normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."

3. Section 404(f)(1)(A) is limited to activities that are part of an "established (i.e., ongoing) farming, silviculture, or ranching operation." This "established" requirement is intended to reconcile the dual intent reflected in the legislative history that although Section 404 should not unnecessarily restrict farming, forestry, or ranching from continuing at a particular site, discharge activities which could destroy wetlands or other waters should be subject to regulation.

4. EPA and Corps regulations [40 CFR 230 and 33 CFR 320] and preamble define in some detail the specific "normal" activities listed in Section 404(f)(1) (A). Three points may be useful in the current context:

a. As explained in the preamble to the 1979 proposed regulations, the words "such as" have been consistently interpreted as restricting the section "to the activities *named* in the statute and other activities of essentially the same character as named," and "preclude the extension of the exemption . . . to activities that are unlike those named." [44 FR 34264].

b. Plowing is specifically defined in the regulations *not* to include the redistribution of surface material in a manner which converts wetlands areas to uplands [See 40 CFR 233.35(a)(1)(iii)(D)].

c. Discharges associated with activities that establish an agricultural operation in wetlands where previously ranching had been conducted, represents a "change in use" within the meaning of Section 404(f)(2). Similarly,

discharges that establish forestry practices in wetlands historically subject to agriculture also represent a change in use of the site [See 40 CFR 233.35(c)].

5. The statute includes a provision at Section 404(f)(2) that "recaptures" or reestablishes the permit requirement for those otherwise exempt discharges which:

a. convert an area of the waters of the U.S. to a new use, *and*

b. impair the flow or circulation of waters of the U.S. *or* reduce the reach of waters of the U.S.

Conversion of an area of waters of the U.S. to uplands triggers both provisions (a) and (b) above. Thus, at a minimum, any otherwise exempt discharge that results in the conversion of waters of the U.S. to upland is recaptured under Section 404(f)(2) and requires a permit. It should be noted that in order to trigger the recapture provisions of Section 404(f)(2), the discharges themselves need not be the sole cause of the destruction of the wetland or other change in use or sole cause of the reduction or impairment of reach, flow, or circulation of waters of the U.S. Rather, the discharges need only be "incidental to" or "part of" an activity which is intended to or will forseeably bring about that result. Thus, in applying Section 404(f)(2), one must consider discharges in context, rather than isolation.

ISSUE:

1. Questions have been raised involving "deep-ripping" and related activities in wetlands and whether discharges associated with these actions fall within the exemptions at Section 404(f)(1)(A). In addition, the issue has been raised whether, if such activities fall within the exemption, they would be recaptured under Section 404(f)(2).

2. "Deep-ripping" is defined as the mechanical manipulation of the soil to break up or pierce highly compacted, impermeable or slowly permeable subsurface soil layers, or other similar kinds of restrictive soil layers. These practices are typically used to break up these subsoil layers (e.g., impermeable soil layer, hardpan) as part of the initial preparation of the soil to establish an agricultural or silvicultural operation. Deep-ripping and related activities are also used in established farming operations to break up highly compacted soil. Although deep-ripping and related activities may be required more than once, the activity is typically not an annual practice. Deep-ripping and related activities are undertaken to improve site drainage and facilitate deep root growth, and often occur to depths greater than 16 inches and, in some cases, exceeding 4 feet below the surface. As such, it requires the use of heavy equipment, including bulldozers, equipped with ripper-blades, shanks, or chisels often several feet in length. Deep-ripping and related activities involve extending the blades to appropriate depths and dragging them through the soil to break up the restrictive layer.

3. Conversely, plowing is defined in EPA and Corps regulations [40 CFR 230 and 33 CFR 320] as "all forms of primary tillage . . . used . . . for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops" [40 CFR 232.3(d)(4)]. As a general matter, normal plowing activities involve the annual, or at least regular, preparation of soil prior to seeding or other planting activities. According to USDA, plowing generally involves the use of a blade, chisel, or series of blades, chisels, or discs, usually 8-10 inches in length, pulled behind a farm vehicle to prepare the soil for the planting of annual crops or to support an ongoing farming practice. Plowing is commonly used to

break up the surface of the soil to maintain soil tilth and to facilitate infiltration throughout the upper root zone.

DISCUSSION:

1. Plowing in wetlands is exempt from regulation consistent with the following circumstances:

a. it is conducted as part of an ongoing, established agricultural, silvicultural or ranching operation; and

b. the activity is consistent with the definition of plowing in EPA and Corps regulations [40 CFR 230 and 33 CFR 320]; and

c. the plowing is not incidental to an activity that results in the immediate or gradual conversion of wetlands to non-waters.

2. Deep-ripping and related activities are distinguishable from plowing and similar practices (e.g., discing, harrowing) with regard to the purposes and circumstances under which it is conducted, the nature of the equipment that is used, and its effect, including in particular the impacts to the hydrology of the site.

a. Deep-ripping and related activities are commonly conducted to depths exceeding 16 inches, and as deep as 6-8 feet below the soil surface to break restrictive soil layers and improve water drainage at sites that have not supported deeper rooting crops. Plowing depths, according to USDA, rarely exceed one foot into the soil and not deeper than 16 inches without the use of special equipment involving special circumstances. As such, deep-ripping and related activities typically involve the use of specialized equipment, including heavy mechanized equipment and bulldozers, equipped with elongated ripping blades, shanks, or chisels often several feet in length. Moreover, while plowing is generally associated

with ongoing operations, deep-ripping and related activities are typically conducted to prepare a site for establishing crops not previously planted at the site. Although deep-ripping may have to be redone at regular intervals in some circumstances to maintain proper soil drainage, the activity is typically not an annual or routine practice.

b. Frequently, deep-ripping and related activities are conducted as a preliminary step for converting a "natural" system or for preparing rangeland for a new use such as farming or silviculture. In those instances, deep ripping and related activities are often required to break up naturally-occurring impermeable or slowly permeable subsurface soil layers to facilitate proper root growth. For example, for certain depressional wetlands types such as vernal pools, the silica-cemented hardpan (durapan) or other restrictive layer traps precipitation and seasonal runoff creating ponding and saturation conditions at the soil surface. The presence of these impermeable or slowly permeable subsoil layers is essential to support the hydrology of the system. Once these layers are disturbed by activities such as deep-ripping, the hydrology of the system is disturbed and the wetland is often destroyed.

c. In contrast, there are other circumstances where activities such as deep-ripping and related activities are a standard practice of an established on-going farming operation. For example, in parts of the Southeast, where there are deep soils having a high clay content, mechanized farming practices can lead to the compaction of the soil below the soil surface. It may be necessary to break up, on a regular although not annual basis, these restrictive layers in order to allow for normal root development and infiltration. Such activities may require

special equipment and can sometimes occur to depths greater than 16 inches. However, because of particular physical conditions, including the presence of a water table at or near the surface for part of the growing season, the activity typically does not have the effect of impairing the hydrology of the system or otherwise altering the wetland characteristics of the site.

CONCLUSION:

1. When deep-ripping and related activities are undertaken as part of an *established, ongoing* agricultural silvicultural, or ranching operation, to break up compacted soil layers *and* where the hydrology of the site will not be altered such that it would result in conversion of waters of the U.S. to upland, such activities are exempt under Section 404(f)(1)(A).

2. Deep-ripping and related activities in wetlands are *not* part of a normal ongoing activity, and therefore *not* exempt, when such practices are conducted in association with efforts to establish for the first time (or when a previously established operation was abandoned) an agricultural, silvicultural or ranching operation. In addition, deep-ripping and related activities are not exempt in circumstances where such practices would trigger the "recapture" provision of Section 404(f)(2):

a) Deep-ripping to establish a farming operation at a site where a ranching or forestry operation was in place is a change in use of such a site. Deep-ripping and related activities that also have the effect of altering or removing the wetland hydrology of the site would trigger Section 404(f)(2) and such ripping would require a permit.

b) Deep-ripping a site that has the effect of converting wetlands to non-waters would also trigger Section 404(f)(2) and such ripping would require a permit.

3. It is the agencies' experience that certain wetland types are particularly vulnerable to hydrological alteration as a result of deep-ripping and related activities. Depressional wetland systems such as prairie potholes, vernal pools and playas whose hydrology is critically dependent upon the presence of an impermeable or slowly permeable subsoil layer are particularly sensitive to disturbance or alteration of this subsoil layer. Based upon this experience, the agencies have concluded that, as a general matter, deep-ripping and similar practices, consistent with the descriptions above, conducted in prairie potholes, vernal pools, playas and similar depressional wetlands destroy the hydrological integrity of these wetlands. In these circumstances deep-ripping in prairie potholes, vernal pools, and playas is recaptured under Section 404(f)(2) and requires a permit under the Clean Water Act.

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In the Supreme Court of the United States

BORDEN RANCH PARTNERSHIP; ANGELO K. TSAKOPOULOS,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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The government and its amici set forth a remarkably expansive view of federal authority over activity that occurs in and around wetlands. According to them, a "discharge" is involved—and a permit required—whenever an activity *disturbs* soil within a wetland. The limits that Congress placed on federal regulatory power in the CWA are on this view meaningless: an "addition" occurs though nothing is added to the wetland; rich native soil turned by the plow to prepare it for crops becomes a "pollutant"; and a plow shank is a "point source" though it neither "confine[s]" nor "convey[s]" anything. *Cf.* 58 Fed. Reg. 45008, 45020-45022 (asserting that even "bicycling * * * through a wetland" is a "discharge activity" for which a permit is required unless there are "only de minimis environmental effects").

Having first claimed authority over deep plowing by stretching each of the key statutory concepts beyond recognition, the agencies keep that authority by turning Congress's exemption for "normal farming and ranching activities such as plowing" into an illusion. According to the government, deep plowing is not "normal farming activity," though the district court found, and petitioners' agricultural amici confirm, that it is a "technique of plowing used by farmers throughout the nation in preparation for the planting of deep-root crops." Pet. App. 35. In any event, the government asserts, the exemption does not apply if plowing changes the wetland's hydrology (which all plowing does) or is in preparation for a new type of crop with different hydrological requirements.

These theories are at odds with the CWA's language and legislative history and should be rejected. One of their pernicious effects is to undermine Congress's goal—nowhere acknowledged in the government's brief—"to recognize, preserve, and protect the primary responsibilities and rights of States to * * * eliminate pollution" and "plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b); see *SWANCC*, 531 U.S. at 173-174. As ten States have informed this Court—including such important

agricultural States as Illinois, Kansas, Nebraska, Ohio, and Pennsylvania—the agencies' "uniquely creative interpretation" of the CWA operates at the expense of state authority, destroying "the balance of powers between federal and state governments established by the Act." Amicus Br. of Alabama, *et al.*, at 2. Another harmful effect is to deter farmers and ranchers from making efficient use of their land, for who would dare plow seasonally soggy soil at all when changing its hydrology could result in massive penalties?

1.a. The government does not dispute that the proscription and permit requirements in Sections 301 and 404 apply only to "point sources," but contends that the statutory definition can be expanded to include deep plowing equipment. U.S. Br. 32-35. The statutory text and structure refute that argument, and the agencies' administration of the CWA for the past 30 years undermines it further.

The statutory definition in Section 502(14) does not explicitly include deep plows or any other agricultural implement. A "point source" is "any discernible, confined and discrete conveyance." Congress then supplied examples: "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Since deep plows are not mentioned in this list, the issue is whether the words "discernible, confined and discrete conveyance" may be construed to encompass them.

The government makes no effort to apply standard tools of statutory construction to this question. Instead, it suggests that the test is whether something "is readily identifiable," "occupies a specific physical space," and is "separate, and therefore distinguishable, from other sources of pollutants." U.S. Br. 33. That formulation substitutes broader words for those enacted by Congress, and results in an unworkable standard since it includes things that the government itself concedes are not point

sources. Even the government's quintessential example of a nonpoint source, the timber ranch in *Pronsolino* v. *Nastri*, 291 F.3d 1123 (9th Cir. 2002), is readily identifiable ("800 acres * * * in the Garcia River watershed," *id.* at 1129), occupies a specific physical space (*ibid.*), and is separate and distinguishable from other sources (*id.* at 1130 n.6, affirming imposition of controls on timber harvesting to reduce sediment runoff from that specific ranch). A construction of "point source" that excludes nothing from its reach is surely suspect.[1]

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The critical statutory terms here are the words "confined" and "conveyance," since most tangible objects are "discernible" and "discrete." In analyzing statutory language, dictionary definitions are useful, *Williams* v. *Taylor*, 529 U.S. 420, 431-432 (2000), and in this case undercut the government's position. A standard dictionary definition of the adjective "confined" is "kept in confines." WEBSTER'S THIRD NEW INT'L UNABRIDGED DICT. (1971) ("WEBSTER'S THIRD"). Relevant definitions of the (usually plural) noun "confine" in turn include "constricting limits (as of an area of activity or operation)" and "enclosed or otherwise limited space or area." *Ibid.* See, *e.g.*, 29 C.F.R. § 1910.146(b) (2002) (OSHA regulation defining a "confined space" as an enclosed space with "limited or restricted means for entry or exit," such as "tanks, vessels, silos, storage bins, hoppers, vaults, and pits"). The ordinary meanings of "confined" thus suggest that a point source is an enclosed spot from which pollutants are or may be discharged. A deep plow shank is an implement pulled through the soil to break it up and

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[1] The government (at 33) contends that the undefined term "nonpoint source" informs the meaning of the defined term "point source." The government cites no authority for this upside-down approach, and we are aware of none.

turn it over. It does not enclose or confine anything, and therefore cannot be a point source. The dictionary definition of "conveyance" also undercuts the government's argument, because it denotes "a means or way of conveying," "carrying, transporting," and "serving as a means of transportation." WEBSTER'S THIRD. Plows, deep or shallow, do none of those things.

The statutory context of the words "confined" and "conveyance" leads to the same conclusion. "[A] passage will be best interpreted by reference to that which precedes and follows it." *Neal* v. *Clark*, 95 U.S. 704, 708 (1878). Under the maxim *ejusdem generis*, "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001). Although the government's brief (at 33) touches on the specific examples of point sources in the definition, it does not draw any comparisons between those examples and the plowing activity at issue here—for the simple reason that there are none.

None of the examples in Section 502(14) resembles deep plowing equipment. The first seven—pipe, ditch, channel, tunnel, conduit, well, discrete fissure—are all means by which liquids can be moved from one place to another. All are normally stationary, and in common understanding are the outfalls from industrial facilities and sewage works, sources that were the primary focus of the CWA when the definition of "point source" was adopted. Pet. Br. 29. It would be a very peculiar use of language to construe any of them to include plows of any type. See Pet. Br. 25 n.14.

Nor are the remaining examples directed to plows. Containers, rolling stock, concentrated animal feeding operations, and vessels and other floating craft are each specific (and unrelated) sources of pollutants that Congress chose to

include in the category of point source.[2] If these suggest anything, it is that when Congress wanted to include something other than the outfall from an industrial plant or sewage works in the category of point source, it did so explicitly. The fact that deep plows are not meaningfully like any of the listed examples shows that the government's expansive reading is wrong.[3]

The CWA's structure confirms this conclusion. In addition to the narrow permit scheme applicable to point source discharges of dredged or fill material created by Section 404, Section 402 established a National Pollutant Discharge Elimination System applicable to point source discharges of all pollutants. *Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1981) ("[e]very point source discharge is prohibited unless covered by a permit" under the NPDES); *EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976). Since Sections 402 and 404 apply to the same kind of source and rely on the same definition of the source, the general CWA provisions concerning point sources under either Section are illuminating. *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986) (identical words used in different portions of statute generally have the same meaning). Those provisions include considerable detail about what categories of facilities must have permits, what levels of treatment are required for each category,

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[2] Contrary to amicus NWF, deep plowing equipment is not "rolling stock," which specifically refers to "the wheeled vehicles * * * owned and used by a railroad [or] motor carrier." WEBSTER'S THIRD.

[3] In *Akers*, see U.S. Br. 34 n.22, a chisel plow or ripper was used in a wetland as one small part of a plan "for the leveling and filling of the Big Swamp" through construction of a huge 3-mile dike using "[h]eavy earth-moving equipment." 15 Envtl. L. Rep. at 20244. Nothing in either the district court's or Ninth Circuit's opinions suggests that the ripper or any plow was treated as a point source, as opposed to the heavy earthmoving equipment, such as a "grader," that was used to build the dike. 785 F.2d at 817, 819.

and what EPA is required to do concerning each. 33 U.S.C. § 1311(b)-(m) (effluent limitations for different categories of point sources); § 1314(b), (d) (level of treatment required of industrial and municipal point sources); § 1316(b) (categories of point sources required to meet new source performance standards). Nothing in those sections remotely addresses plowing of any kind or other agricultural activities.[4]

EPA's administration of the CWA recognizes that this kind of activity is not a point source. Section 304 directs the Administrator to develop technical data and promulgate guidelines to facilitate regulation of point sources. *E. I. DuPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 116 (1977). EPA is also required "to publish regulations providing guidance for effluent limitations on existing point sources." *Ibid.* The list set forth in 33 U.S.C. § 1316(b) includes 27 categories of point sources; EPA has identified and promulgated regulations for additional categories. 40 C.F.R. Parts 400-471. Yet *none* of the categories identified remotely encompasses plowing, ripping, chiseling, or any form of mechanized cultivation, and EPA has never recognized plows or ripper shanks, or the equipment that pulls them, as point sources under 33 U.S.C. § 1314(b).

Finally, the government's constant reference in its brief to a broad and generic category of "earthmoving equipment" as "point sources" is no substitute for close analysis of the sources of pollution that Congress actually authorized the agencies to regulate. Whether or not backhoes, mechanical shovels, graders, dump trucks and other heavy construction equipment that captures and confines material to move it elsewhere may be point sources, that sort of earthmoving equipment is completely

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[4] As we pointed out (Pet. Br. 28), when the CWA does address "agricultural and silvicultural activities" (§ 304(f)(2)(A))—the kind of activity that gave rise to this case—it categorizes them as "nonpoint sources of pollution." The government does not mention Section 304(f) and does not respond to this argument.

different from a deep plow, which is simply a shank pulled through soil by a tractor or other equipment in order to prepare the land for planting. No reasonable construction can turn a plow shank into a "confined" "conveyance."

1.b. Native soil loosened and turned by deep plowing to plant deep-rooted crops is not a "pollutant" subject to Section 404.[5] Section 404 requires a permit only for the discharge of a subset of "pollutants," "dredged or fill material." Native soil cultivated for productive agricultural use is neither dredged nor fill material within the Act's plain language or as defined by EPA or Corps regulations.

The district court correctly concluded that deep plowing does not involve dredged material. Pet. App. 38 n.7. Corps and EPA regulations define dredged material as "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c); 40 C.F.R. § 232.2. Excavated material is material "d[ug] out and remove[d]" or that results from forming

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[5] The government incorrectly asserts that we have waived this argument. The district court found that petitioners discharged a "pollutant" in the form of "fill" material. Pet. App. 38 n.7. Petitioners argued on appeal that plowed soil is not "fill." CA Br. 25. The court of appeals rejected petitioners' argument that nothing was added to the wetland as a pollutant. Pet. App. 6-8. The holding below that plowed soil is a pollutant was a necessary predicate of the decision since only an addition of a pollutant requires a permit. Petition Question One explicitly presents the issue whether plowing adds a "pollutant." See Pet. i, 5-6, 17, 19. So does the government's restatement of the first question presented in its brief in opposition, in which waiver was not alleged. Br. in Opp. i, 10. See Sup. Ct. Rule 15.2; *City of Canton* v. *Harris*, 489 U.S. 378, 385 (1989). The parties and amici have fully briefed the issue, which is fairly subsumed in the questions presented for decision and integral to the meaning of the statutory term "discharge." See *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 378-382 (1995); *Arkansas Elec. Coop.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382 n.6 (1983).

a "cavity" by "cutting, digging, or scooping." WEBSTER'S THIRD. Dredged material is material "ca[ught], gather[ed], or pull[ed] out by a dredge." *Ibid.* A dredge is "a machine for scooping up or removing earth (as in excavating or deepening stream or harbor channels, building levees, or digging ditches), usu[ally] by a series of buckets on an endless chain, a pump or suction tube, or a single bucket or grab at the end of an arm." *Ibid.* Deep plowing does not dig, scoop, or cut material out of a wetland, and does not involve a bucket, pump, or suction tube. Deep plowing, as the district court observed, drags a narrow shank through the soil to "break up, mix, homogenize, loosen, aerate, and horizontally move soil" to prepare it for planting. Pet. App. 36. EPA regulations list examples of activities that could produce dredged material, including "mechanized landclearing, ditching, channelization, or other excavation." 40 C.F.R. § 232.2. None is remotely like deep plowing.

Deep plowing also does not involve fill material. During the relevant time period, the Corps defined fill material as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body." 33 C.F.R. § 323.2(e) (1994);[6] see also WEBSTER'S

[6] EPA regulations defined fill material as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose." 40 C.F.R. § 232.2 (1994). That the EPA and Corps differently defined a term of enormous importance to those potentially regulated by the CWA and potentially subject to large civil penalties or criminal prosecution is, to say the least, puzzling. After the Ninth Circuit's decision in this case, the Corps and the EPA changed their definitions of fill material to "material *placed in* waters of the United States where the material has the effect of either replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water." 67 Fed. Reg. 31129 (May 9, 2002) (emphasis added). The soil affected by

THIRD ("fill" or "fill material" is "material used to fill a receptacle, cavity, or passage"). Plowing, which includes "all forms of primary tillage," "prepare[s] [soil] for the planting of crops." 33 C.F.R. § 323.4(a)(1)(iii)(D). The soil affected by plowing is not used to fill a cavity or to replace an aquatic area, but is broken up, turned, and aerated for the primary purpose of preparing the soil to produce crops by hydrating deep roots. See California Farm Bur. Amicus Br. 10-11 & n.8.

The Corps understood that the discharge of fill material results from activities such as "construction of any structure or infrastructure" in a wetland, "site-development fills," "causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices," "beach nourishment; levees," and "structures such as sewage treatment facilities." 33 C.F.R. § 323.2(f). Each of these activities has as its purpose filling water with material so that it is possible to create artificial structures, recreational areas, or roads. Plowing to grow crops is categorically different from any of these activities. Accordingly, the Corps expressly recognized that "the term [discharge of fill material] does not include plowing * * * for the production of food." *Ibid.*; see also RGL 86-01 ("Plowing for the purpose of producing food, fiber, and forest products and meeting the definition in Section 323.4 will never involve a discharge of dredged or fill material").[7]

deep plowing would not be fill material under the new definition because the movement of soil within a wetland associated with plowing places no material in the wetland.

[7] Respondents' shopping center example (at 24 n.16) is not analogous to plowing. Shopping centers pave over and fill "waters" with concrete and impervious surfaces, displacing any hydrologic function. By contrast, farmers are stewards of the land who plow and preserve it to cultivate crops; they do not grade land and pave over it to construct shopping centers. Native soil bulldozed and compacted into a section of a wetland as a base for construction of a shopping

Native soil turned and loosened by deep plows is not dredged or fill material and it is not a pollutant. The Act defines "pollutants" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste." 33 U.S.C. § 1362(6). None of these terms describes rich native soil (not "rock" or "sand" or "cellar dirt" or "dredged spoil") in which crops are to be grown.[8] And "biological material," in the context of the statute's other examples, means not anything at all that ultimately derives from a living organism, but biological wastes. See *Ass'n to Protect Hammersley, Eld, & Totten Inlets* v. *Taylor Resources, Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002) (to be in the same category as the other statutorily enumerated pollutants, "biological materials" must mean waste material); *Circuit City*, 532 U.S. at 114-115. Furthermore, even if agricultural soil could be considered rock, sand, or biological material, these and other *potential* pollutants logically become actual pollutants only when extracted from their original location and discarded as waste or placed as fill in a wetland area. Deeply plowed soil that is to be used to grow crops *in situ* is not dredged material, fill material, or any other pollutant.

I.c. In an effort to show that deep plowing within a wetland results in the "addition" of a pollutant, the government paints a picture (at 25-27) of plow shanks dragging soil from adjacent uplands into the wetland and also pulling into the wetland soil from the hardpan and below. This argument—which appears nowhere in the Corps' 1996 Field Memorandum on deep plowing (Pet. App. 199-207)—proves too much, making

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center may well be a pollutant. Native soil broken up and aerated with a deep plow so water can better reach the roots of crops is not.

[8] Neither the term "earth" nor the term "dirt," which the government repeatedly uses at U.S. Br. 22-24, appears in the statute.

nonsense of the agencies' regulations. Those regulations recognize that "[t]he term discharge * * * does not include plowing" (33 C.F.R. § 323.2(f)), meaning "all forms of primary tillage." *Id.* § 323.4(a)(1)(iii)(D). Yet *all* types of plowing have a similar effect. See Pet. App. 36 (deep ripping and shallower disking work soil in same way); AFBF Amicus Br. at 11, 13 (goal of all plowing is hardpan penetration); Tr. RT 519-522, TE 678Q, ER 286 (restrictive soil layer on Borden Ranch, government's expert testified, occurred at depths as shallow as four or five inches). If deep plowing with a ripper or chisel plow pulls some adjacent upland soil and hardpan into a wetland, and if that is enough to constitute an "addition" of a pollutant, then so do disking, moldboard, wide-blade, and all other forms of plowing, and the Corps' regulations stating that one may plow in a wetland without causing a "discharge" are meaningless and misleading.

The government also distorts the district court's factual findings. The district court recognized that Borden Ranch's deep plowing predominantly "turn[ed] over material already in the" wetlands, which the district court incorrectly believed was enough for a "discharge." Pet. App. 36; see also Pet. App. 86-88 (finding numerous swales and drainages filled without finding that soil entered the wetland from outside). Only in the case of three jurisdictional features (out of 29) did the court find that soil had been deposited from uplands, and only then as a result of adjacent *upland* plowing. Pet. App. 89; Pet. App. 34-35 n.5 (under 33 C.F.R. § 323.2(d)(3)(i), "any incidental addition * * * associated with" upland activities does not require a permit). Though the government would convert the court's observation that deep plowing results in some movement of the soil "horizontally and vertically" into a specific finding that soil entered the wetland from outside, the district court made no such finding, and the Ninth Circuit did not suggest that was the effect of Borden Ranch's deep ripping either. See Pet. App. 6, 36 (focusing on "redeposit" of soil from within wetland); UNIV.

OF CAL. DIV. OF AG. SCIENCES, MANAGING AND MODIFYING PROBLEM SOILS 6-10 (Apr. 1982) ("Rippers break up hard layers by cracking and shattering; there is little mixing or dislocation of layers. * * * Upon wetting and drying, clay layers usually reseal"). That neither court was interested in such details is not surprising, for both believed, as the government also contends, that the source of agency authority lies in identifying harm to a wetland, not in carefully ascertaining if each requirement of Section 404 jurisdiction has been met. See, *e.g.*, Pet. App. 8, 38-39; U.S. Br. 27 & n.18, 31.

The government's contention (at 27-31) that no "addition" is necessary—that small movements of soil within a wetland of the sort caused by deep plowing are enough—is at odds with *National Mining*, where an "addition" would have been involved had the test urged by the government here been applied. It is at odds with the plain meaning of the term "addition," which requires that something be added. *Cf.* Pet. App. 8 (through Borden Ranch's plowing "no new material has been 'added'"). And it is at odds with Section 404(a)'s application only to discharges made "at specified disposal sites." By no stretch of the imagination can deep plowing to grow crops be said to move plowed soil to a "specified disposal site"—language the government makes no effort to explain. See *National Mining*, 145 F.3d at 1410 (Silberman, J. concurring) (both terms show Congress had in mind "temporal or geographic separation between excavation and disposal"). *Deaton*, upon which the government places great weight, is irrelevant, for it involved digging a 1240-foot ditch, which produced a statutorily identified pollutant ("dredged spoil") that was lifted out of the wetland then returned to it elsewhere from a point source (a bucket)—an operation bearing no resemblance whatever to plowing to turn soil in place to make it more productive for crops.

1.d. The CWA's plain language shows that deep plowing does not result in the discharge of dredged or fill material.

Congress's definitions of "discharge," "point source," and "pollutant" and choice of the word "addition" exclude plowing from any of Section 404's provisions. These statutory terms and definitions, as well as regulations and guidance that interpret them not to reach plowing, remained intact after Congress added Section 404(f) in 1977. See 42 Fed. Reg. at 37124 (1977) ("The [1975] regulations * * * identified certain types of activities that were excluded from the program *because they do not involve the discharge of dredged or fill material into water*. Plowing * * * for the production of food * * * w[as] included in this list of excluded activities") (emphasis added); 40 Fed. Reg. at 31321, 31325 (1975); 1986 RGL 86-01 (U.S. Br. Add. 12a) (plowing for food production "is not subject to any of the provisions of Section 404 including the Section 404(f) exemption limitations"); 33 C.F.R. §§ 323.2(f), 323.4(a)(1)-(iii)(D). Having long stated that plowing does not result in a discharge, the agencies should not now be heard to assert (at 36-37) "that even ordinary plowing may result in a discharge." See *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 130 (1983).

Congress in 1977 included normal farming activities in Section 404(f)'s enumeration of non-prohibited activities to *reinforce* their previously established exclusion from the regulatory ambit of Section 404. 3 1977 LEG. HIST. 351 (statement of Rep. Hammerschmidt) ("These exemptions reemphasize that Congress never intended [normal farming, ranching, and silviculture activities] to be considered discharges of dredged or fill material"); see Pet. Br. 36-39 (citing numerous statements from legislative history to same effect). Congress considered this reinforcement and clarification desirable because the Corps, in an odd but well-documented effort to *limit* its jurisdiction, had issued a press release threatening to claim authority over a wide array of agricultural activities. See AFBF Amicus Br. 6-8.

Congress in Section 404(f)(1) did not purport to modify the statutory definition of "discharge." On its face, that provision

merely states that if any "normal farming and ranching activities" result in a discharge, those activities should nevertheless be exempt. Normal farming activities such as plowing are not mentioned at all in the narrow recapture provision, Section 404(f)(2), which obviously applies only to activity that is a "discharge" covered by Section 404(a) that would otherwise be exempt under Section 404(f)(1). Nothing in Section 404(f) suggests that plowing like that engaged in by Borden Ranch, which does not "add" a "pollutant" from a "point source," results in regulated "discharges." The provision also exempts "seeding" and "harvesting," which it is likewise difficult to imagine resulting in "discharges."

The Corps' RGL 86-01, issued to provide mandatory guidance to Corps field offices, confirms the limited import of Section 404(f): "Plowing for the purpose of producing food * * * is not subject to any of the provisions of Section 404 including the Section 404(f) exemption limitations. Section 404(f) is applicable to those activities that do involve a discharge but are statutorily exempted from the need to obtain a 404 permit." U.S. Br. Add. 12a.[9] See also 58 Fed. Reg. 45008, 45012 (1993) ("We agree * * * that Section 404(f)(2) does not expand the scope of activities subject to Section 404"); CWA § 404(f)(2) (recapturing only certain "discharge[s] of dredged or fill material"). Deep plowing to grow deep-rooted crops was never within the purview of § 404(a), and the 1977 amendments did not place it there.

I.e. The government's brief paints a misleading picture of petitioners' conduct and the nature and extent of their activity

[9] Although RGL 86-01 states that it would expire after 1988, the Corps advises the regulated community that guidance provided "generally remains valid after the expiration date" until "superseded by specific provisions of subsequently issued regulations or RGLs." Preamble to Corps RGL Index (http://www.usace.army.mil/inet/functions/cw/cecwo/reg/rglsindx.htm).

in seasonal wetlands. Tsakopoulos did not intend to deep plow or discharge fill into the Ranch's swales and other drainage features, merely to cross them in the course of plowing surrounding uplands. Pet. 9-11; Pet. Br. 12-14; Pet. App. 143.[10] He attempted to follow the Corps' oral guidance—not mentioned in Respondents' brief—that he could cross them with raised shank without a permit. Pet. 9-11; Pet. Br. 12-14. The district court found plowing depth irrelevant and held that even shallow, raised-shank plowing violates Section 404. Pet. App. 123-124. Contrary to the government's assertion (at 14-15 & n.11), the district court did not find that any deep ripping occurred in the areas at issue after November 1996. Pet. App. 79-82, 103-104.

Government amici pretend this case is about "streams," "seagrass beds," "bays, estuaries and deltas," "rivers, lakes, perennial streams" (NWF Amicus Br., passim), "irrigation ditches" (Zedler Amicus Br. 14), "swamps" (*id.* at 8), the Everglades (*id.* at 10), "oxbow lakes and mudflats" (*id.* at 12) "mined streams" (*id.* at 23, n.38), and "salt marshes." *Id.* at 24, n.39. It is not. Those are all substantial "waters" and "wetlands" that could not be plowed in their natural state, that could not

[10] The government's observation (at 16) that Borden Ranch affected about 2 acres of drainage features while deep plowing about 900 acres of uplands to plant grapes and apples shows petitioners' primary purpose to farm uplands while avoiding wetlands to the extent feasible. Borden Ranch's plowing did not involve extensive areas of jurisdictional waters. Pet. App. 77, 105. Only a minority of drainages affected were found "obliterated" (Pet. App. 86, 106) and those were located on a single parcel that the Ranch had not owned or plowed for about two years. Pet. App. 87-88, ER 527-625. To add perspective, this alleged "conversion" of less than one half acre of drainages to uplands (Tr. RT 1550-1551) occurred at a time when the Corps' top official, Col. John Reese, testified that up to one acre of wetlands could be completely destroyed under the Corps' regulations with no Section 404 permit. Tr. RT 127-131.

support heavy deep plowing equipment, and that bear no hydrological similarity to the normally dry, seasonally wet drainages on the semi-arid Borden Ranch.[11] The Borden Ranch's drainages differ because they can be plowed and farmed without prior manipulation and because they are not the "true marshes or swamps intended to be protected by Section 404." Pet. Br. 41, quoting Sen. Muskie comments.

The scientist amici focus on inappropriate types of wetlands and activities. This case does not involve "drainage" activities (2, 4, 5 & n.4), dikes, dams, levees, or other structures designed to divert water (10), nor does it involve waters or wetlands too wet to plow or farm (10-13), an attempt to regulate agricultural runoff as non-point source pollution (15-16), or the draining of the Everglades (24-25). The scientists' brief reflects a great deal of armchair academics and unfamiliarity with the land and issues *involved in this case*. Had they visited it, the scientists would know that Borden Ranch vineyards and orchards *do* have grasses growing between rows to control erosion and *do* benefit from drip irrigation and integrated pest management. *Cf. id.* at 16. The sediment runoff from agricultural uplands with which the scientists appear primarily concerned (at 15-16) is not even regulated under Section 404. Pet. Br. 26.

2.a. Even if petitioners' deep plowing were a "discharge," it would be exempt from federal regulation pursuant to Section 404(f)(1)(A)'s exemption for "normal farming * * * and ranching activities such as plowing * * * for the production of food." Regulations that purport to narrow the scope of that exemption to exclude plowing rangeland to make it suitable for

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[11] The obvious distinction is supported by the common sense "observations of a Kentucky farmer who said [wetlands] were lands 'too wet to plough and too dry to fish.'" R. GADDIE & J. REGENS, REGULATING WETLANDS PROTECTION: ENVIRONMENTAL FEDERALISM AND THE STATES 18 (2000).

growing crops and to exclude deep plowing are invalid, for they contradict the plain language of the statute. U.S. Br. 39-42.

As the government concedes, the plain meaning of "normal farming and ranching activities" is activities that are the "norm" or "rule" for farmers and ranchers and that "confor[m] to [the] type" or "standard" of farming and ranching activities. U.S. Br. 40 n.26, quoting WEBSTER'S THIRD. Deep plowing rangeland to grow crops qualifies as normal farming and ranching activity under that definition. It is something that farmers and ranchers have done across the Nation for hundreds of years, as they have adapted their operations to changing consumer demand, shifting commodity prices, government incentive programs, the availability of irrigation, and other factors. See AFBF Amicus Br. 14-16; California Farm Bur. Amicus Br. 14-18. Switching from growing forage to crop production, using whatever type of plowing is necessary to prepare the particular land for the particular crop, is normal farming and ranching activity because it conforms to what farmers and ranchers have long done and still do in the ordinary course of operating their businesses and is "considered routine." 3 1977 LEG. HIST. at 494 (Sen. Jennings).

It is impermissible for the agencies to interpret the plain language that Congress used to mean something entirely different. There is no reasonable sense of the phrase "normal farming or ranching activity" that excludes activity that switches land from one ranching or farming use to another—which is how the agencies nevertheless interpret the phrase in 33 C.F.R. § 323.4(a)(1)(ii) and 40 C.F.R. § 232.3(c)(1)(ii). See U.S. Br. 39-40. And there is no reasonable sense of the word "plowing," as an example of a "normal" farming and ranching activity, that excludes deep plowing merely because it breaks the hardpan in a seasonal swale or drainage allowing water to seep down to the root level of the new crop—which is how the agencies nevertheless interpret the word in 33 C.F.R. § 323.4(a)(1)(iii)(D) and 40 C.F.R.

§ 232.3(d)(4). See U.S. Br. 41. These definitions stray so far from the statutory language that they are entitled to no deference. On any reasonable interpretation, petitioners' deep plowing fits within the exemption set forth in Section 404(f)(1)(A).

2.b. Petitioners' deep plowing is not recaptured by CWA Section 404(f)(2). That provision applies only to an activity "having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject," where the flow, circulation, or reach of waters is impaired. Borden Ranch has always been "subject to" use to grow a crop other than forage—something that could be achieved simply by plowing the land and planting, as had previously been done with portions of the Ranch. See Pet. App. 68 (Ranch has produced wheat, hay, alfalfa, tomatoes, beets, beans, and corn). Unlike a swamp or bog, the seasonal wetlands on Borden Ranch are plowable in their natural state, without prior filling or dredging.

Congress's oft-stated purpose not to impose the CWA's time-consuming and costly permitting process on ordinary farm and ranch activities may not be thwarted by treating a switch from one crop (forage for cattle, which on private rangeland is often seeded and cultivated) to another crop (grapes and apples) where the activities associated with *both* of those uses fit squarely within the agricultural/ranching exemption. A change from one use exempt under Section 404(f)(1)(A) to another cannot reasonably be treated as bringing the land into "a use to which it was not previously subject," where the change merely requires plowing land that is tillable in its natural state. Insofar as 33 C.F.R. § 323.4(a)(1)(ii) is intended to recapture those sorts of commonplace and necessary changes in agrarian land use, it is unreasonable and not entitled to deference. That the second crop has different water needs, requiring deeper plowing to prepare the soil, makes no difference. Congress distinguished between changes wrought in the "flow," "circulation," and "reach" of navigable waters and subjecting those waters to a

new use. *Both* elements must be present before recapture occurs. The agencies are not free to make changes in hydrology all that count. See U.S. Br. 45-46 (identifying as exempt only a "change from one wetland crop to another"); 1996 Field Memorandum, Pet. App. 206-207 (stating that regardless of intended use, "deep-ripping" in "depressional wetlands" is recaptured because of its effect on "the hydrological integrity" of the wetland).

3. The government offers no justification in its brief for treating each pass of a ripper through a jurisdictional feature as a separate violation triggering a separate $25,000 penalty. In fact, the government's interpretation—which has never been set forth in regulations or guidance and is entitled to no deference—is unreasonable because it has ridiculous results. For a narrow linear wetland that could be deep plowed in two passes along its length but only in twenty across its width, whether the maximum penalty is $50,000 or $500,000 depends on whether the farmer plowed across or along the field, though the impact on the wetland may be identical either way. And fewer passes with a wider shank would produce a lower penalty than if the farmer used a narrower shank that required more passes. Beyond these absurdities, treating each pass of a plow as a violation lacks a rational basis. It in no way correlates to the number or extent of "additions" of pollutants, to extent of damage, amount of material moved, intent, or any other conceivably relevant factor (as the example of the two ways to plow a linear wetland shows). It is arbitrary, and turns the size of the maximum penalty in a particular case into a mere fortuity.

To treat each pass with the plow as a separate violation triggering its own penalty creates no desirable incentive. The government has identified no benefit from providing incentives to plow in a single sweep, with long passes, or with wider shanks to minimize possible penalties. While the government and courts below assert that application of Section 309(d)

should not create incentives to pack dredging and filling into a single day, it is equally unclear why they should create incentives to design plowing patterns with the fewest number of passes. Other statutory provisions deter intentional conduct (Pet. Br. 50), and disincentive to continue violations once discovered already exists by virtue of the courts' statutory discretion to consider good faith efforts to comply and the seriousness of violations to downwardly adjust maximum penalties. 33 U.S.C. § 1319(d).

Rather than respond to our argument, the government inexplicably asserts that we did not raise it below. U.S. Br. 48. The Ninth Circuit, however, described our argument as being that the penalty should "not [have been based] on the number of individual passes with the ripper" (Pet. App. 13) and "that treating each rip as a separate violation could lead to nonsensical results." Pet. App. 15. It rejected those arguments when it ruled that "each pass of the ripper [i]s a separate violation." Pet. App. 16. Clearly, this issue was preserved and ruled upon below and is properly before this Court.

The addition to a wetland of dredged or fill material by the same method on the same day is properly a single violation. There is no rational basis for subdividing it into separate passes of the plow, turning a single activity into numerous distinct violations. Under that approach, the government concedes (at 50 n.35), the maximum penalty would have been considerably less than that used by the district court in its calculations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
and UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION AND THE ALABAMA, ALASKA, FLORIDA, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND AND SOUTH CAROLINA STATE FARM BUREAU FEDERATIONS IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 01-1243

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
and UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION AND THE ALABAMA, ALASKA, FLORIDA, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND AND SOUTH CAROLINA STATE FARM BUREAU FEDERATIONS IN SUPPORT OF PETITIONERS

With the written consent of the parties given and filed with the Clerk of the Court, the American Farm Bureau Federation, Alabama Farm Bureau Federation, Alaska Farm Bureau, Inc., Florida Farm Bureau Federation, Idaho Farm Bureau Federation, Illinois Agricultural Association, Kansas Farm Bureau, Louisiana Farm Bureau Federation, Inc.,

Montana Farm Bureau Federation, Nebraska Farm Bureau Federation, New Hampshire Farm Bureau Federation, Inc., New York Farm Bureau, Inc., North Dakota Farm Bureau, Oregon Farm Bureau Federation, Pennsylvania Farm Bureau, Rhode Island Farm Bureau Federation, Inc., and the South Carolina Farm Bureau Federation (hereinafter collectively referred to as "Farm Bureau") respectfully submit this brief as *amici curiae*.[1]

INTEREST OF *AMICI CURIAE*

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 5 million member families. The Alabama Farm Bureau Federation, Alaska Farm Bureau, Inc., Florida Farm Bureau Federation, Idaho Farm Bureau Federation, Illinois Agricultural Association, Kansas Farm Bureau, Louisiana Farm Bureau Federation, Inc., Montana Farm Bureau Federation, Nebraska Farm Bureau Federation, New Hampshire Farm Bureau Federation, Inc., New York Farm Bureau, Inc., North Dakota Farm Bureau, Oregon Farm Bureau Federation, Pennsylvania Farm Bureau, Rhode Island Farm Bureau Federation, Inc., and the South Carolina Farm Bureau Federation, are constituent members of AFBF, representing the interests of farmers and ranchers in their respective states.

[1] Counsel for *amici curiae* have authored this brief in whole and no other person or entity other than *amici*, their members or counsel have made a monetary contribution to the preparation or submission of the brief.

Farm Bureau's farmer and rancher members produce virtually every agricultural commodity produced commercially in the United States. They own or lease significant amounts of land on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. In recent years they have become increasingly subjected to restrictive laws and regulations that impair their ability to farm and ranch efficiently, and, in some instances, have eliminated their ability to farm and ranch altogether. The protection of wetlands under Section 404 of the CWA poses one of the more onerous regulatory problems production agriculture faces today.

Section 404 of the CWA, 33 U.S.C. § 1344, regulates "the discharge of dredged or fill material into the navigable waters at specified disposal sites." From its inception in 1972 and its court ordered expansion in 1975, the Section 404 permit program remains a most controversial, complex and contentious program. Its application and misapplication to farms and farming have played a key role in its evolution.

Farm Bureau has a direct interest in the outcome of the instant case. Farm Bureau has followed the wetland protection evolution for nearly three decades and watched it take on a life of its own as it marched relentlessly up the hill consuming ever-dryer land. Those forces which did not succeed in getting federal land use control legislation in the late 1960s and early 1970s have seized upon the Section 404 wetlands program as a mechanism to control as much of the landscape as possible. The federal agencies, especially the Environmental Protection Agency, Corps of Engineers and the Fish and Wildlife Service, with the aid of the courts, have been happy to cooperate in expanding the reach of the Section 404 wetlands program.[2] The Ninth Circuit has now expanded

[2] A prime example of the Corps willingness to interject itself into matters of local land use regulation is the situation which gave rise to this Court's decision in *Solid Waste Agency of Northern Cook County v. U.S.*

the reach of Section 404 regulatory jurisdiction to activities that Congress clearly never intended to be regulated.

Farm Bureau's farmer and rancher members have been severely restricted in the productive use of their farm and ranch lands by the Ninth Circuit's crabbed interpretation of Section 404(f) of the Clean Water Act (CWA)—an interpretation that eviscerates the Congressional exemption of normal farming practices from the burdens of the CWA's Section 404 permit program. The Ninth Circuit's construction of the statute's exemption and "recapture" provisions expands the reach of the CWA far beyond what Congress intended, at best creating uncertainties about permissible conduct and at worst exposing farmers and ranchers pursuing routine farming activities to substantial penalties.

Farm Bureau urges this Court to reverse the Ninth Circuit's decision to correct its unjustified narrowing of a legislative exemption expressly intended to shield farmers and ranchers from excessive entanglement with overzealous bureaucratic agencies.

STATEMENT

Petitioner, Borden Ranch, located near Sacramento, California, was fined $1.5 million at the behest of the U.S. Army Corps of Engineers (Corps) for deep plowing agricultural lands, that contained wetlands and had been used to grow

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Corps of Eng'rs., 531 U.S. 159 (2001). There the Corps lent its federal regulatory powers to opponents of a proposed solid waste landfill to override state and local approvals therefor by finding jurisdictional wetlands to exist under its overly broad "migratory bird rule." Given the Corps' propensity to become involved in local land use regulation today, one is given cause to wonder if the instant case isn't the result of the Corps lending its federal regulatory powers under Section 404 to the side of the antis in the California "grape war" described by Joseph Kahn in his April 14, 2002 New York Times' article entitled "Lawsuits in Eden; Fury Over Napa Vineyards."

forage crops, to prepare the soil for higher value, deep rooted crops. The Corps asserted jurisdiction over this plowing under Section 404 of the Clean Water Act (CWA).

A 2 to 1 majority of the Ninth Circuit upheld the Corps' assertion of Section 404 jurisdiction ruling that deep plowing resulted in a "discharge" (plowing) of "pollutants" (plowed native soil) from a "point source" (the plow). In so ruling, the Ninth Circuit erroneously rejected, among others, petitioner's argument that its plowing activities were exempt from regulation under the provisions of Section 404(f) which expressly exempt "normal farming . . . and ranching activities such as plowing." The Ninth Circuit erroneously ruled that the so-called "recapture" provision of Section 404(f) can make "even normal plowing" and "any farming activity" regulable when it "changes a wetland's hydrological regime."

Dissenting Judge Gould would have correctly held "that the return of soil in place after deep plowing" does not produce a regulated "discharge" because it does not involve any "addition" of material to the site. He would have correctly held that the "farmer exemptions" apply to deep plowing even assuming for sake of argument that it did produce a regulated "discharge." Judge Gould stated that the "crux of this case is that a farmer has plowed deeply to improve his farm property to permit farming of fruit . . . more profitable than grazing" and that farmers have engaged in such agricultural activities and pursuits "from the beginning of our nation."

Farm Bureau submits that Congress in the CWA never intended that plowing or any other normal farming activity on agricultural lands containing wetlands would fall within the scope of federal Section 404 regulatory jurisdiction and penalties. To the contrary, Congress clearly confirmed this intent in the broad "normal farming" exemption provisions of Section 404(f).

Neither plowing nor any other normal farming activity was a regulatory issue under Section 404 until the Corps made it one through exaggerated statements of potential regulatory impacts made for the purpose of gaining political support for limiting its jurisdictional responsibility to traditionally navigable waters. The Corps was initially reluctant to extend its new dredge and fill regulatory authority under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA) beyond traditionally defined navigable waters, such as lakes, large rivers and intercoastal waterways. Stine, *Regulating Wetlands in the 1970s,* Journal of Forest History, April 1983, at 65. Senior Corps officials were convinced that Congress intended the Corps to so limit its dredge and fill regulatory activities for fear that "[a] broader interpretation of section 404 . . . would be tantamount to federal land use control." *Id.* at 66. Consequently, the Corps was surprised and disappointed when Judge Aubrey F. Robinson, Jr., ruled in *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975) that "navigable waters" extend to "the maximum extent permissible under the Commerce Clause of the Constitution" and are "not limited to the traditional tests of navigability" and directed the Corps to revise and expand it regulations. *Id.*

The Department of Justice refused to appeal and the administration gave the Corps no policy guidance. Corps officials realized that any challenge to the court ordered expansion of Section 404 regulatory jurisdiction would have to take place in the political arena. *Id.* at 67. On May 6, 1975, the Corps issued a news release calculated to ensure maximum outcries over proposed regulations drafted in cooperation with the Environmental Protection Agency (EPA) and environmental groups and published for public comment on the same date. Most notably, the press release warned:

> [F]ederal permits may be required by the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountainer who wants to protect his land against stream erosion.

The release further warned that "millions of people may be presently violating the law" and "may be subject to fines up to $25,000 a day and one year imprisonment." *Id.*

The anticipated firestorm was quick to follow as the story was picked up by newspapers across the country. Environmental groups viewed the news release as a deliberate attempt by the Corps to sabotage the court ruling and were concerned that the political forces unleashed by the Corps might well indeed lead to the overturn of the decision by Congress. Outcries from the agricultural and forestry communities were particularly pronounced, especially after the Secretary of Agriculture began a campaign against the extended regulations. *Id. at 68.*

Responding to the furor raised by the May 6, 1975 news release, the Corps backtracked from its exaggerated impacts statements by including in its regulatory definitions of "dredged material" and "fill material" an *exclusion* for "[m]aterial resulting from normal farming, silvaculture [sic], and ranching activities, such as plowing, cultivating, seeding, and harvesting, for the production of food, fibre, and forest products. 33 C.F.R. § 209(d)(4) and (6) (July 25, 1975). As the Corps made clear in the preamble to those regulations, material resulting from these practices was neither fill nor dredged material and, thus, was excluded from regulation under Section 404. This exclusion, among others, written into the Corps' 1975 regulations, and concurred in by the EPA, became the catalyst for the statutory *exemptions* enacted by Congress as Section 404(f) of the 1977 amendments to the FWPCA (which amendments also redesignated the FWPCA as the "Clean Water Act" (CWA)).

It is important to note that Congress *exempted* what the Corps, with the blessing of the EPA, had already *excluded*. In

other words, Congress said that any discharges of dredged or fill material resulting from normal farming practices were exempt from regulation whereas the agencies had already said these practices were not a discharge of dredged or fill material in the first place. There is nothing in the statute or legislative history to suggest that Congress intended to no longer treat these practices as exclusions. In fact the legislative history indicates that it was the intent of the Congress to endorse the agencies' exclusions and did not intend to draw a distinction between an *exemption* and an *exclusion.*[3]

As the legislative record clearly indicates, Congress was responding to the furor of its agricultural constituency when it enacted the "normal farming" exemption in 1977. It was the intent of Congress to put Section 404 regulatory matters back to where they were before the Corps' exaggerations opened Pandora's box in its effort to limit its jurisdictional responsibilities to traditional navigable waters. Congress was making it clear with the broad "normal farming" exemption provisions that it never intended to regulate plowing or any other normal farming activity under Section 404 when it enacted the FWPCA in 1972.

The legislative record also clearly shows that the caveat which Congress included in the so-called, but mislabeled "recapture" provision of Section 404(f), was for the limited

[3] Congressman Hammerschmidt, for example, stated: "On the positive side, we will now have for the first time statutory recognition that normal farming, ranching and silviculture activities do not belong in this permit program. *These exemptions reemphasize that Congress never intended these activities to be considered discharges of dredged or fill material."* [Emphasis added.] House debate, December 15, 1977. Report on Resolution Providing for Consideration of Conference Report on H.R. 3199, Clean Water Act of 1977, p. 351. And Senator Baker: ". . . First the conference bill clarifies *the exclusion of activities that do not involve point source discharges of dredged or fill material, such as plowing*, seeding, cultivating, harvesting, and upland conservation and minor drainage practices. . . ." Senate debate, December 15, 1977. *Id.* at 524.

purpose of precluding the "normal farming" exemption from being misconstrued as authorizing the conversion of wetland areas to agricultural uses where none could otherwise have been undertaken. Because the farming exemption was written so broadly, there were fears expressed by Congress' environmental constituents that it could be construed to allow the filling and conversion of otherwise untillable wetlands as long as it was for agricultural purposes. Section 404(f)(2) was added to dispel such concern. Further, it clearly was not intended to "recapture" anything, but rather merely to preclude the farming exemption from being used as justification to fill and otherwise manipulate wetlands to convert them into new agricultural lands suitable for tilling, such as the situation involved in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983), where bulldozers and backhoes were employed not merely to plant crops, but to perform earthmoving, excavation and ditching activities with engaged blades and shovels to dry out water bodies.

Thus, the Ninth Circuit's narrow construction of the "normal farming" exemption and its expansion of the "recapture" provisions of Section 404(f) do not comport with the relevant statutory or regulatory language, history or practical realities. The unjustified results of the Ninth Circuit's decision for production agriculture are:

1. The decision drastically narrows the normal farming exemption of Section 404(f)(1) and places the U.S. Army Corps of Engineers and the Environmental Protection Agency in the business of regulating day-to-day farming and ranching practices.
2. The decision makes a farmer or rancher's plow a point source of pollution.
3. The decision finds that normal agricultural plowing results in the discharge of dredge and fill pollutants.

4. The decision expands the Section 404(f)(2) "recapture" provision to the point where a farmer or rancher will not be able to change his cropping patterns or commodity mix without a permit from the federal government or significant concern of a substantial penalty for violating the Clean Water Act.

Farm Bureau urges this Court to correct the Ninth Circuit's errors and to restore the "normal farming" exemption to the broad scope originally intended by Congress.

ARGUMENT

I. DEEP PLOWING IS NORMAL PLOWING AND A NORMAL FARMING ACTIVITY EXEMPT FROM REGULATION BY CWA SECTION 404(f)

Congress made a deliberate policy choice when it enacted the broadest possible exemption for normal farming activities like plowing from regulation under Section 404. Congress provided that no permit is required for "the normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting . . . or upland soil and water conservation practices," or "for purposes of construction or maintenance of . . . irrigation ditches, or the maintenance of drainage ditches." 33 U.S.C. § 1344(f)(1)(A), (C).

Plowing was recognized in the exemptions as a normal farming activity, but beyond that it was not otherwise described in either statutory language or legislative history. That is because it was common knowledge that plowing is a normal farming activity and it was also commonly known that farmers and ranchers employ many types of plowing in the normal conduct of their production agriculture activities that vary with location, climate, types of soils, types of crops, developing technology and a whole host of other variables. That is why, for instance, when the U.S. Department of Agriculture conducts its periodic survey of the nation's

agricultural resources, its lists 16 different types of plowing (including "deep ripper") for its interviews to use in tabulating plowing activity by farmers and ranchers. See, *i.e.*, *Agricultural Resource Management Study (ARMS), Phase II—Production Practices, Interviewer's Manual*, U.S. Department of Agriculture, National Agricultural Statistics Service,

Nowhere is there a definition of plowing as to a particular type of plowing, or maximum depth to which plowing may be performed or the frequency plowing must be performed in order to remain within the realm of a normal farming activity that Congress intended to exempt. Similarly, nowhere is there any inference that plowing should ever be so defined. Normal plowing is that which farmers and ranchers employ to meet their production agricultural needs. In other words, normal plowing would be a matter for the agricultural community to determine. That is why, among other reasons, it is ludicrous and beyond the Corps or EPA's authority to specify depths and frequencies of exempt plowing as they did in their December 12, 1996 Field Memorandum on "Deep ripping." RGL. No. 96-02, Army Corps of Engineers and Environmental Protection Agency, December 12, 1996. The Corps is not the arbiter of what production agriculture activities are "normal."

As indicated above, "deep ripping" is but one of numerous types of normal plowing that farmers and ranchers routinely employ in the conduct of their production agricultural activities. The basic purpose of "deep ripping" is to provide hardpan penetration (a basic purpose and result of all types of plowing) *and* at the same time form root beds that allow ample plant root development as well as water infiltration and retention.

The term "deep ripping" can refer to plowing that involves depths ranging from a few inches for such crops as lettuce, soy beans, wheat, cotton, and pumpkins, to several feet for

grape vines and fruit trees. See *i.e.*, Rester, *Subsoiling to Increase Cotton Yields,* Louisiana State University, Ag Center Research & Extension (deep ripping 12 to 15 inches to fracture hardpans); *2001 Virginia Cotton Production Guide*, Virginia Cooperative Extension Service, Virginia Tech (ripping and bedding 6 to 9 inches); *For More Soybeans, Dig Deep*, Agriculture Research, February 1999 (deep tillage to a depth of 12 to 16 inches); *The Mid-Atlantic Wine Grape Grower's Guide*, North Carolina State University (subsoiling 18 to 24 inches); *Irrigating Deciduous Fruit and Nut Trees in Oregon*, Oregon State University Extension Service, May 1996 (deep ripping to 4 feet). It is also a recommended practice by both state agricultural extension services and environmental quality agencies for not only improved crop yields, but also for disease control and water conservation and quality control. See *i.e.*, *Minimum tillage practices affect disease and yield of lettuce*, California Agriculture, January-February 2002 (deep ripping 15 to 20 inches); *Small Ranch*, University of Nevada at Reno (controlling soil erosion due to compacted soil runoff by deep ripping and planting or mulching); *Irrigation Management Practices To Protect Ground Water And Surface Water Quality, State of Washington*, EM4885, Washington State Department of Ecology and Cooperative Extension, Washington State University (rip hardpans and compacted soils to improve filtration rates).

The fact that "deep ripping" may not be performed annually or on a frequent basis does not make it any less a "normal" plowing activity for production agricultural purposes. The frequency with which it is performed depends upon matters such as the degree of compaction of the soil and the needs of the crop to be grown. It may be performed only once in connection with the establishment of a vineyard or orchard, once every several years where no-till practices are used, or it may be performed annually in the growing of row

crops or grains. Frequency is not the determining factor in what constitutes "normal" in production agriculture; crops, conditions, technology and results are.

Thus, depth and frequency of occurrence have nothing to do with normal plowing for purposes of the Section 404(f) agricultural exemption. As previously indicated, the purposes of "deep ripping" are twofold: hardpan penetration *and* root bed preparation. Hardpan penetration usually takes place within a matter of a few inches. Otherwise the depth to which "deep ripping" is to be performed depends upon the root bed needed for the particular type of crop to be planted, and this depth may range from a few inches to several feet. In sum, "deep ripping" is "normal plowing" and a normal farming or ranching activity that is exempted from Section 404 regulation.

II. PASTURES AND FORAGE CROP LANDS ARE ESTABLISHED AGRICULTURAL LANDS

The Ninth Circuit, rubber stamping the interpretation of overzealous regulators, ruled that changing pasture and forage croplands containing wetlands to vineyards and orchard was akin to the conversion of wetland areas to agricultural uses where none had previously existed.

Contrary to the Ninth Circuit's holding, pastures and forage crop lands have always been recognized as agricultural lands. This fact was evident when the National Academy of Science undertook its extensive study of wetland characteristics and boundaries. As stated in their published report:

> Agricultural wetlands are defined here as wetlands found on agricultural lands. Agricultural lands, in turn, are those that are intensively used and managed for food and fiber production and from which natural vegetation has been removed and cannot be used in making a wetland determination. Examples include cropland, hayland, and pasture composed of planted grasses and legumes;

orchards; vineyards; and areas that support wetland crops such as cranberries, taro, watercress, and rice (NFSAM, 1994.).

Wetlands Characteristics and Boundaries, National Academy Press, 1995, at 158.

Further, an examination of the examples of normal farming and ranching activities enumerated in Section 404(f) lends support to the view that Congress did not intend the courts applying the exemption to manufacture artificial distinctions in land usage for various agricultural purposes (such as between pastures and vineyards and orchards). The listed activities include *land preparation* (plowing, seeding), *production* (cultivating, harvesting), and *maintenance* (drainage and conservation). Contrary to the Ninth Circuit's holding, there is absolutely no indication that Congress regarded the precise nature of a farmer or rancher's actions within this wide range of conduct as determinative of the exemptions applicability.

Congress understood the frequency with which farmers and ranchers can, and often must, change and/or diversify their operations to achieve an economically viable or more profitable farming or ranching operation. The transition from one farming or ranching use to another, such as from pasture to planting crops, occurs often in production agriculture. Preparatory activities, which may include draining and plowing and often occur over a period of years, still constitute normal farming and ranching activities.

Pasturing and planting are simply subsets of the myriad activities that comprise "normal farming." Acknowledging this reality, the statute and regulations give farmers and ranchers flexibility to operate within the broad categories of activities (farming, silviculture, and ranching) to which the Section 404 exemption applies, without worrying that the choice between one sort of farming or ranching activity and another on a given piece of land may result in a CWA

violation. The Ninth Circuit's ruling that it is the *particular* existing use of a portion of a farm or ranch that counts in determining if the normal farming exemption applies, not the fact that the land is part of a *continuing farming or ranching operation*, destroys this very necessary flexibility and for practical purposes destroys the exemption.[4]

The Ninth Circuit also wrongly construed the recapture provision of Section 404(f) to extend the reach of the CWA into normal farming activities that Congress intended to leave alone. That provision requires permitting for an activity that "bring[s] an area of the navigable waters into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2). The statute provides no further elaboration on the meaning of "use," and the conflicting provisions of the implementing regulations simply confuse matters.

On the one hand, the regulations appear to adopt a broad and flexible approach to farming and ranching "uses" and "activities" by specifying that a "permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from a silviculture to agricultural use." 33 C.F.R. § 3323.4(C). This provision implies that a conversion from one agricultural use to another – for example, from irrigated forage crop production and pasturing to vineyards and orchards—would avoid the recapture provision. On the other hand, the regulation states categorically that "[a] conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States." *Id.* This latter provision lacks textual or structural support in the CWA, is inconsistent with related regulatory provisions, and, more importantly, conflicts with the intent of

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[4] Of interest in this regard is a statement included by EPA in the preamble to its regulations adopted in 1980 defining exempt "plowing": "Several commentators questioned the requirement that plowing take place on 'established' farm or forest lands. This requirement has been deleted."

Congress. See *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977) ("The question . . . is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations"). Every indication in the statute and regulations, save this one, points to "farming, silviculture, or ranching"—not to "wetlands or non-wetlands"—as the relevant frames of reference for the application of the recapture provision.

Moreover, the legislative history of the normal farming exemption makes clear that Congress did not mean to interfere with the operations of farms and ranches by requiring a permit every time a farmer or rancher makes a change in the productive use of agricultural lands from one crop to another, or from pasture to planting. Congress, as Senator Muskie pointed out, well understood that "draining poorly drained farm[land]" would affect a substantial hydrological alteration to "millions of acres" nationwide. *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Water Pollution Control Act* (1978) at 1042. Yet, as the Senator stated, the 1977 amendments established "once and for all" that no permits are required for such activities. *Id.* Accordingly, the Ninth Circuit's contrary ruling notwithstanding, the recapture provision of Section 404(f)(2) does not remove active and ongoing farming and ranching operations from within the ambit of the normal farming exemption merely because there occurs a change from one agricultural use to another.

III. THE NINTH CIRCUIT NEGATED THE SECTION 404(f) NORMAL FARMING EXEMPTION WHEN IT RULED THAT THE "RECAPTURE" PROVISIONS CAN MAKE EVEN NORMAL PLOWING AND ANY OTHER FARMING ACTIVITY REGULABLE WHEN IT CHANGES A WETLAND'S HYDROLOGY

The Ninth Circuit ruled that the "recapture" provisions of Section 404(f) can make "even normal plowing" and "any farming activity" regulable when it "changes a wetland's hydrological regime." Such activities were deemed to result in "environmental damage sufficient to constitute a regulable redeposit" even when there is no "discharge" and "do not involve the introduction of material brought in from somewhere else." *Borden Ranch Partnership v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 814, 815 (9th Cir. 2001).

The Ninth Circuit's decision has rendered Congress' legislative effort to exclude plowing and other normal farming activities from the regulatory reach of Section 404 an exercise in futility. The Ninth Circuit has negated the carefully crafted exemption for plowing and other normal farming activities that Congress enacted in 1977 because most normal farming activities and *any and all plowing* will result in a change to a wetland's hydrological regime and will, therefore, never be exempt from Section 404 regulation.

Furthermore, contrary to the Ninth Circuit's ruling, the CWA makes it very plain that the existence of a "discharge" and a "pollutant" are the critical, deciding factors that determine its reach. Section 301(a) prohibits the "discharge of any pollutant" except as authorized by other sections of the Act. 33 U.S.C. § 1311(a). Section 404 is one such exception. Section 404 authorizes the Corps to issue permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344. Section 404 makes it very plain that the existence of a "discharge"

and "dredged or fill material" pollutants are critical, deciding factors in determining its jurisdictional reach.

The Corps' implementing regulations contain a lengthy definition of "discharge of fill material" which provides in pertinent part:

> The term *discharge of fill material* means the addition of fill material into waters of the United States . . . The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products . . . .

33 C.F.R. § 323.2(f).

The EPA's and Corps regulations defining plowing also expressly exclude this activity from regulation under Section 404 as a "non-discharge":

> Plowing means all forms of primary tillage, including moldboard, chilsel, or wide-blade plowing, discing, harrowing, and similar physical means utilized on farm, forest or ranch land for breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops . . . Plowing as described above *will never involve a discharge of dredged or fill material.* (Emphasis added.)

EPA regulations 40 C.F.R. 232.3(d)(4) and Corps regulations 33 C.F.R. 323.4(a)(1)(iii)(D). The emphasized language that plowing will never involve a discharge of dredged or fill material first appeared in the Corps' regulations of 1975 and has been included in both agencies regulations since 1980.

Because of continuing disputes and remembering the lashing it took in 1975 for daring to insinuate that Section 404 might apply to plowing, the Corps issued a guidance letter on February 11, 1986 reminding its districts that:

> Plowing for the purpose of producing food, fiber, and forest products and meeting the definition in Section 323.4 will never involve a discharge of dredge or fill material. Such plowing is not subject to any of the provisions of Section 404(f) exception limitations. Section 404(f) is applicable to those activities that do

> involve a discharge but are statutorily exempted from the need to obtain a permit.

RGL 86-01, Army Corps of Engineers, February 11, 1986.[5]

No conflicting guidance to RGL 86-01 was issued until the December 12, 1996 Field Memorandum on "deep ripping" which guidance represented a complete reversal of the Corps' long standing position on plowing and a direct contradiction of it regulations.

The Ninth Circuit's ruling upholding the Corps in this case is in complete conflict with the "discharge" and "pollutant" requirements of the CWA generally and Section 404 specifically. By allowing the EPA and the Corps to assume jurisdiction over plowing and other normal farming activities simply on the basis of their environmental effects, the Ninth Circuit has negated the normal farming exemption provisions of Section 404(f). The Ninth Circuit's decision must be reversed and the integrity of the normal farming exemption restored to American farmers and ranchers as Congress intended.

CONCLUSION

The judgement of the Court of Appeals should be reversed.

Respectfully submitted,

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[5] A copy of RGL 86-01 has been lodged with the Clerk by the Petitioner.

(8)

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BRIEF AMICUS CURIAE OF CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether deep plowing ranch land to plant deep-rooted crops constitutes the "addition" of a "pollutant" (the plowed soil) from a "point source" (the plow) so as to fall within the regulation of Section 404 of the Clean Water Act.

2. Whether deep plowing ranch land which is farmable in its natural state to plant deep rooted crops is statutorily exempt from regulation under Section 404(f)'s exemption for any discharge from "normal farming . . . activities such as plowing[.]"

3. Whether the Clean Water Act's civil penalty section, authorizing penalties "not to exceed $25,000 per day for each violation," authorizes assessing the maximum daily penalty for each time a plow crosses a seasonal drainage feature, without regard to the number of days when such activity occurred.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, the California Farm Bureau Federation, California Cattlemen's Association, and Pacific Legal Foundation respectfully submit this brief amicus curiae in support of Petitioners.[1] Written consent for amici curiae participation in this case was granted by counsel of record for all parties and has been lodged with the Clerk of the Court.

The California Farm Bureau Federation (CFBF) is a nonprofit corporation and is California's largest farm organization. It has 53 county farm bureau affiliates located throughout California through which it represents owners and operators of farms and ranches. CFBF represents approximately 43,000 California farm families who grow over 250 kinds of crops. California Farm Bureau Federation's farm families contribute the majority of agricultural production in California which saw its agricultural marketings reach $27.2 billion in 2000. Many of these families farm on lands that contain the types of seasonally wet ranch land at issue in this case.

The California Cattlemen's Association is a nonprofit corporation that was founded to represent California's beef cattle industry in legislative and regulatory affairs. Beef cattle producers operate on over 38 million of California's 100 million acres and contributed $1.32 billion to the state's

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae California Farm Bureau Federation, California Cattlemen's Association, and Pacific Legal Foundation affirm that no counsel for any party in this case authored this brief in whole or in part; furthermore, no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

multi-billion dollar agriculture economy as recently as 1997.[2] The industry provides more than 26,000 jobs from the ranch level to the processing level in the State of California alone.

The California Farm Bureau Federation and California Cattlemen's Association's members conduct their operations on lands that include swales, ditches, vernal pools, and man-made stock ponds and watering holes. These lands, especially in California's Central Valley, are often covered with "hardpan," that is, clay soils through which rainwater does not easily percolate.

Farming and ranching operations, especially small-scale operations, often require changes in crops to take advantage of favorable markets. But changing crops in the Central Valley and elsewhere in California often requires deep plowing so that hardpan or compacted soils will accommodate the irrigation needs of the new crops. Cattlemen and farmers, much like the Petitioners in this case, are increasingly encountering United States Army Corps of Engineers' personnel who assert Clean Water Act section 404 permitting jurisdiction over these plowing activities.

The California Farm Bureau Federation and California Cattlemen's Association believe that the Corps' assertion of jurisdiction over this plowing extends the Corps' jurisdiction far beyond what was intended under the Clean Water Act. The ramifications of Corps jurisdiction are troubling, as they will have severe economic consequences on the state's agricultural industry. Many CFBF and CCA members are deeply concerned they may lose their ability to maintain viable agricultural operations if the normal activity of deep plowing becomes subject to the permitting discretion of federal bureaucrats.

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[2] http://www.calcattlemen.org/aboutcca.htm (last visited Aug. 13, 2002).

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases across the country concerning the interpretation of the Clean Water Act and its restrictions on landowners' rights to use their private property in a reasonable, productive manner. For example, PLF participated as amicus curiae before this Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), and before the United States Circuit Court of Appeals in *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). PLF has many members who are ranchers or farmers and PLF's attorneys have represented the agricultural industry on many occasions. PLF believes the decision of the Ninth Circuit in this case may seriously impair the ability of many California farmers and ranchers to make profitable agricultural use of their lands.

STATEMENT OF FACTS

Borden Ranch Partnership acquired an 8,400-acre ranch in the Central Valley of California in 1993. The Partnership's intent was to continue farming and introduce higher value vineyard and orchard crops. Petition for a Writ of Certiorari (Pet.) at 9. The ranch property had been used previously for cattle grazing, irrigated pasture, and growing wheat, hay, alfalfa, and some row crops. *Id.*

However, vineyard and orchard crops could not be grown on some of the land without deep plowing because the soil was too heavily compacted. Deep plowing loosens and mixes—virtually in place—the compacted soil to a depth of four to six feet. It breaks through the hard pan soil to allow the infiltration of irrigation water.[3]

The Corps objected to Borden Ranch's deep plowing in areas the Corps contends contain waters of the United States (seasonal drainage swales).[4] The Corps charged that without a permit, the deep plowing in these areas constitutes a discharge of dredged or fill material prohibited by Section 404 of the

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[3] The Corps describes deep plowing, which it calls deep-ripping, as

> the mechanical manipulation of the soil to break up or pierce highly compacted, impermeable or slowly permeable subsurface soil layers, or other similar kinds of restrictive soil layers. These practices are typically used to break up these subsoil layers (e.g., impermeable soil layer, hardpan) as part of the initial preparation of the soil to establish an agricultural or silvicultural operation. Deep-ripping and related activities are also used in established farming operations to break up highly compacted soil. Although deep-ripping and related activities may be required more than once, the activity is typically not an annual practice. Deep-ripping and related activities are undertaken to improve site drainage and facilitate deep root growth, and often occur to depths greater than 16 inches and, in some cases, exceeding 4 feet below the surface . . . .

Regulatory Guidance Letter No. 96-02, *Applicability of Exemptions Under Section 404(4) to "Deep Ripping" Activities in Wetlands* (Dec. 12, 1996).

[4] Drainage swales are "shallow linear features ranging from several inches to several feet wide, and up to several hundred feet long—which exist and carry stormwater runoff for brief periods only during and after seasonal rains, and which ultimately drain to intermittent streams." Pet. at 6.

Clean Water Act. The lower courts agreed with the Corps. (*See* Pet. at 9-15, for a detailed explanation of the facts in this case.)

SUMMARY OF ARGUMENT

Section 404 of the Clean Water Act, 33 U.S.C. § 1344, authorizes the Corps[5] to require permits for those activities that "discharge" or "add" a pollutant from a "point source" into navigable waters. Section 404 expressly exempts from this permitting requirement "normal farming . . . and ranching activities, such as plowing," which do not convert an area of water into a use to which it was not previously subject. 33 U.S.C. § 1344(f).

The Ninth Circuit's decision conflicts with the express limiting provisions of the statute. Plowing does not involve the discharge of a pollutant from a *point source*. Specifically, a plow is not a *point source*. Also, as explained in *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d at 1404, incidental fallback of dirt into wetlands during dredging activities does not *add* a pollutant to the nation's waters and therefore is not subject to the Corps' section 404 regulation. Deep plowing, like all forms of plowing, does not remove soil from the ground as does dredging. It merely breaks apart compacted soil to allow root penetration and does not even involve fallback, much less incidental fallback. Deep plowing, if anything, *adds* only *air* to the land being plowed which is certainly not a pollutant.

The Ninth Circuit's finding that the Corps has section 404 jurisdiction over deep plowing also contradicts the express exemptions in the 1977 amendments to the Clean Water Act, for normal farming and ranching activities, 33 U.S.C. § 1344(f), the Corps' own regulations, interpreting its jurisdiction, 33

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[5] EPA oversees the Corps' enforcement of Section 404, 33 U.S.C. § 1344(c); 40 C.F.R. pt. 231 (2002).

C.F.R. § 323.4(a)(1)(i) (2002), and legislative history. When Congress amended the Clean Water Act in 1977, it sought to protect the normal agricultural activity of plowing from the costly and often arbitrary section 404 permitting process. In short, the Corps has no jurisdiction under the Clean Water Act to regulate Borden Ranch's plowing, whether it be shallow or deep, because Congress never sought to have the federal government control what crops a farmer may plant.

In summary, the language and legislative history of the 1977 amendments to the Clean Water Act, as well as the narrow physical scope of deep plowing, provide an overwhelming basis for this Court to overturn the Ninth Circuit and reject the Corps' unauthorized exercise of section 404 jurisdiction over plowing.

ARGUMENT

I

THE PLAIN LANGUAGE OF THE 1977 AMENDMENTS TO THE CLEAN WATER ACT SHOWS THAT PLOWING DOES NOT CAUSE A "DISCHARGE" THAT IS SUBJECT TO SECTION 404 REGULATION

The interpretation of section 404 of the Clean Water Act applied by the Corps to Borden Ranch in this case is not a permissible construction of the statute. *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984). Here the Corps has ruled that deep plowing is a "discharge" subject to section 404 jurisdiction. The Ninth Circuit upheld this interpretation. However, this conclusion is not supported by the plain language of the statute, its legislative history, or the principles of soil mechanics.

"[T]he starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 56 (1987). For plowing to be controlled by Section 404, it must involve the

"discharge of dredged or fill material into the navigable waters[6] . . . ." 33 U.S.C. § 1344(a) (footnote added). This is a specific requirement derived from Section 301(a) of the Act which prohibits the "discharge of any pollutant" unless in compliance with the permit (e.g., Section 404) requirements of the Act. 33 U.S.C. § 1311(a). The term "pollutant" (33 U.S.C. § 1362(6))

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[6] The Clean Water Act defines navigable waters only as "the waters of the United States, including the territorial seas," § 1362(7). This Court in *SWANCC*, 531 U.S. 159, addressed whether the Corps' definition of "waters of the United States" in 33 C.F.R. § 323.2(a)(5) (1978), was what Congress intended. This Court found that the regulation read the term "navigable" out of the definition by expanding "waters of the United States" to include "isolated wetlands" and later, "intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters of the United States, the degradation of which could affect interstate commerce." 33 C.F.R. § 323.2(a)(5). This Court earlier found section 404 jurisdiction over nonnavigable wetlands located *directly adjacent* to open waters, *United States v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985), but in *SWANCC* the Court refused to expand jurisdiction per the Corps' regulation to "isolated wetlands" not adjacent to open water bodies. To do so would make a nullity of the word "navigable" as used in the Clean Water Act. *SWANCC*, 531 U.S. at 172.

While this Court did not address jurisdiction over the types of "wetlands" now involved in this case, Amici strongly believe that this Court's reasoning in *SWANCC* should also bring into question the Corps' Section 404 jurisdiction over the "widely dispersed seasonal drainage swales and intermittent drainages" on the "semi-arid Borden Ranch." Pet. at 6. This Court recognized that Congress may have intended Section 404 to cover only "waters adjacent to 'navigable waters,' such as nonnavigable tributaries and streams." *SWANCC*, 531 U.S. at 171. Borden Ranch did not enter any tributaries or streams but confined its plowing to less than a collective 2 acres of normally dry areas where rainwater collected or flowed downhill. Thus, Amici believe the plowing in this case did not involve <u>any</u> jurisdictional waters of the United States.

can include soil. *United States v. Wilson*, 133 F.3d 251, 259 (4th Cir. 1997), *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983).[7] Thus, soil can be a pollutant and can be "dredged or fill material" subject to Section 404. However, for "plowing" to be controlled by Section 404, it must also involve the "discharge" of the soil (dredged or fill material).

The Act defines the "discharge of a pollutant" as "any **addition** of any pollutant [or pollutants] to navigable waters from any **point source**." 33 U.S.C. § 1362(12) (emphasis added). Accordingly, for plowing to be a discharge, it must "add" "soil" to the "waters" (dry drainage swales) from a "point source" (plow). The clear and plain meaning of these terms shows that plowing fields cannot be a "discharge of a pollutant" as that phrase is defined in the Act.

First, a plow is not a "point source." The Act defines "point source" as any discernable, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. 33 U.S.C. § 1362(14). The legislative history rejects any interpretation that a plow meets this definition. Senator Baker made it quite plain in debate over the conference report that "conferees adopted the Senate amendments to section 404 that clarifies the exclusion of activities that do not involve point source discharges, such as plowing . . . ." *See* Vol. 3, *A Legislative History of the Clean Water Act of 1977*, Serial No. 95-14 (Oct. 1978) (1977 Leg. History) at 524. He

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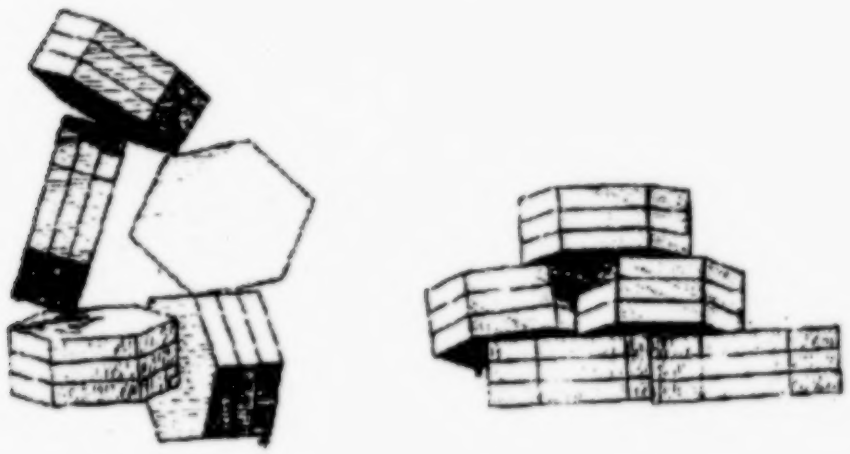
[7] *But see Association to Protect Hammersley, ELD, & Totten Inlets v. Taylor Resources*, No. 00-35667, 2002 U.S. App. LEXIS 15656 (9th Cir. Aug. 6, 2002), which restricts the term "pollutant" to a "waste material of a human or industrial process." *Id.* at *23-*24. Soil used for growing crops is certainly not a waste material.

reiterated this later saying: "The conferees agreed to adopt the approach taken by the Senate in the Senate-passed bill with respect to activities performed by the farming . . . industries. First, the conference bill clarifies the exclusion of activities that do not involve point source discharges of dredged or fill material, such as plowing, seeding, cultivating, harvesting, and upland conservation and minor drainage practices." *Id.* Senator Wallop also expressed the need to protect agriculture from the reach of section 404 explaining that "certain activities that do not involve point source discharge . . . will be adequately controlled by [best] management practices" and that "normal farming [and] ranching . . . activities such as plowing . . . were not intended to require 404 permits." 3 1977 Leg. History at 529.

Moreover, a plow is not a conveyance. The soil is broken and turned in place. It is not carried to another location. As noted by Petitioners, a plow has never been characterized before as a "point source." (Pet. at 20.) The majority decision failed to follow the clear and plain meaning of the statutory terms and instead analogized the plows used by Borden Ranch to bulldozers and backhoes that have been found to constitute point sources when used in a completely different manner to convey soil from one location to another. Specifically, those bulldozers and backhoes had been used for clearing land by moving huge amounts of soil, leveling and filling sloughs, and cutting brush and vegetation at ground level. *See Avoyelles*, 715 F.2d at 923. The bulldozers and backhoes were not used, as was a plow in this case, just to turn over and break up soil. The lower court failed to recognize the essential distinction between machinery used to remove, redistribute, and pile dirt in wetlands and machinery used in this case only to mix and loosen the soil in place. Thus, the plow used by Borden Ranch in this case is not a "point source" subject to section 404 jurisdiction.

Second, Borden Ranch's deep plowing did not cause the addition of a pollutant; rather, deep plowing includes picking up the soil and putting it back in the same place without altering its chemical composition or adding any other material than what was originally there. From the technical perspective, deep plowing is the alteration of the soil's bulk density by reorganizing the soil particles to allow more air into the soil. This is depicted in the following illustration:



In the figure you see an illustration of pore size diversity as the result of the structure formation. The right side of the figure depicts the soil prior to deep plowing and the left side is the soil after deep plowing. Both illustrations contain the same amount of soil "particles," but the figure on the left has more porosity (air space). This addition of air space by reorganizing the soil's most basic building blocks is the result of deep plowing. The soil's particles are rearranged to allow more air to enter the soil and thus affect the soil's bulk density. This decrease in bulk density is what allows the roots of various

crops to grow with fewer impediments.[8] The Corps' conclusion that deep plowing by Borden Ranch was adding a pollutant is not supported by sound soil science. If anything was added, it was air.

Borden Ranch's deep plowing is similar to other soil moving activities that have been found not to add any pollutant to navigable waters. In *National Mining Association v. Army Corps of Engineers*, 145 F.3d 1399, the Corps sought Section 404 jurisdiction over the removal of soil from a wetland area because some of the dirt fell back onto the wetland during removal. The court found that

> the straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall

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[8] *See* McKyes, E., Soil Cutting and Tillage 87-123 (1985) (detailed discussion of soil loosening and manipulation including: measurements of soil loosening, efficiency of soil loosening, soil mixing and inversion, and tool spacing; detailed discussion of soil physical properties and plant growth including: soil compaction, mechanical and hydraulic properties of compacted soil, soil physical properties, and plant growth and tillage of compacted soil). *See also* Becher, H.H., *Penetration Resistance of Pelosol Samples as Affected by Their Moisture Status*, 1 International Soil Tillage Research Organization 97 (8th ed. 1979) (soil penetration resistance high enough to impede root growth can only be reduced by decreasing the bulk density of the soil); Henning, Stanley, J., et al., *Tillage with Tile Drainage in Restored Soil*, 1 International Soil Tillage Research Organization 106 (8th ed. 1979) ("[D]eep tillage may be necessary in replaced soils where compacted horizons hinder root growth and water movement."); and Lovely, W.G., *Overview of Conservation Tillage Systems*, National Conservation Tillage Conference 181 (1973) ("The soil is manipulated to promote movement of air, water, and roots through the soil for better growth of plants and to control runoff erosion." (Citing Free, George & Larson, Bill, *Preparing the Seedbed*, Yearbook of Agriculture (1960))).

> back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge.

Id. at 1404. Of course, **plowing** also is not an act of discharge or adding pollutants to a wetland. It is an act of reducing soil's bulk density, or "breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops." 33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4) (2002). As with the removal of soil from a wetland, plowing adds nothing to the land. Since no soil is added or removed it does not even involve the "incidental fall back" of soil that is being broken up and turned over.

However, rather than recognize *National Mining Association* as controlling, the Ninth Circuit's decision below instead found this case was governed by two completely inapposite cases, one in the Ninth and one in the Fourth Circuit. *See Borden Ranch Partnership v. Army Corps of Engineers*, 261 F.3d 810, 814 (9th Cir. 2001). In those cases, soils had been removed by buckets from waters and wetlands and then later redeposited into those areas. In *Rybachek v. United States Environmental Protection Agency*, 904 F.2d 1276 (9th Cir. 1990), a placer miner excavated dirt and gravel from a stream bed to an out of stream location, sifted out the gold, and later disposed of the leftover waste material by redepositing it back into the stream. This mining operation has no similarity to the actions of Borden Ranch which did not remove the soil, change its character, and redeposit the spoils. To the contrary, Borden Ranch simply turned the dirt over in place without changing its composition or adding any material to it. As Judge Gould explained in his dissent in this case, deep plowing "does not involve any significant removal or 'addition' of material to the site." *Borden Ranch*, 261 F.3d at 820. Moreover, "[b]ecause deep [plowing] does not move any material to a substantially different geographic location and does not process such

material for any period of time, *Rybacheck* is not controlling." *Id.*

The second case relied on by the majority, *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), also involves a totally different activity that includes the removal and redeposit of the soil. In that case, a landowner excavated a drainage ditch in wetlands and sidecast the dredged material onto the wetlands bank alongside the ditch. The court adopted the position that once material is removed from a wetland it becomes a pollutant, and its redeposit becomes an addition of a pollutant subject to Section 404. *Id.* at 335-36. Despite the fact that Borden Ranch neither excavated nor redeposited the soil, the Ninth Circuit majority in this case found deep plowing was analogous to *Deaton*'s sidecasting. *Borden Ranch*, 261 F.3d at 814. Dissenting Judge Gould did not agree and once again found *National Mining Association* was more persuasive stating that "[a] farmer who plows deeply is not, in my view, redepositing dredged or excavated materials." *Id.* at 820.

The reasoning of the Ninth Circuit and the Corps of Engineers squarely conflicts with basic soils dynamics and the correct analytical approach of the D.C. Circuit in *National Mining Association.* Deep plowing normally dry, seasonally wet ranch land does **not add** a pollutant to the nation's waters subjecting it to Section 404 regulation.

II

THE NINTH CIRCUIT'S DECISION IGNORED AN ADAMANT CONGRESSIONAL COMMAND THAT PLOWING RANCH AND FARM LAND IS AN ACTIVITY EXEMPT FROM SECTION 404 REGULATION

The Ninth Circuit ruled that the Corps has Section 404 permitting jurisdiction to regulate Borden Ranch's deep plowing of its seasonally damp ranch land. *Borden Ranch Partnership v. Army Corps of Engineers*, 261 F.3d at 814-16.

It ruled this even though Borden Ranch has a long history of uninterrupted agricultural use in these areas of the ranch and even though its deep plowing was done solely to improve agricultural operations by introducing different food crops that require more porous soil. The Ninth Circuit's legal conclusion flies in the face of congressional intent and if not overturned can result in serious economic injuries to California's farmers and ranchers.

A. California Farmers and Ranchers Depend on the Normal Farming and Ranching Activity of Deep Plowing

California agriculture has a tremendous impact on the lives of individuals throughout the world. It is home to eight of the top ten United States farm counties[9] and in every single one of them deep plowing is a long practiced, normal farming activity.[10] California's top four farm exports—almonds, wine, cotton, and table grapes[11]—all require deep plowing prior to

[9] United States Department of Agriculture, National Agricultural Service, 1997 Census of Agriculture, AC 97-S-2, *Ranking of States and Counties*, 27, Vol. 2, Subject Series Part 2.

[10] Interview with Hal Collin, President of Agri-Struction (Mar. 15, 2002), a family-owned agricultural land improvement company in business since 1934. Deep plowing allows for better water penetration which in turn allows the roots of the crop to grow deeper. This provides for more stability in tree and vine crops. It also results in better yields, better quality, more efficient use of the water applied to the crop, recharging the ground water, and more efficient utilization of fertilizers and agricultural chemicals that are applied to the crop. *Id.* *See also* University of California Cooperative Extension, *Managing and Modifying Problem Soils* 4-6 (1974).

[11] California Department of Food and Agriculture, *Agricultural Resource Directory 2001* 34 (2001).

planting.[12] Besides producing all of the nation's almonds, California is the nation's sole producer (99% or more) of figs, kiwi fruit, olives, persimmons, pistachios, prunes, raisins, and walnuts,[13] each of which also often requires deep plowing prior to planting particularly in areas like California's Central Valley that contain clay soils.[14] Nectarines, peaches, plums, oranges, apples, pears, gueros and jalapeno chili peppers, lettuce, all nut crops, loose leaf lettuce, and alfalfa often require deep plowing too.[15]

Deep plowing occurs where a crop needs irrigation water to penetrate through the soil, but the soil is too highly

[12] *See* University of California Cooperative Extension, *Sample Costs to Establish an Almond Orchard and Produce Almonds* 3 (2001); University of California, Division of Agricultural Sciences, Leaflet No. 2946, *How to Appraise Soil Physical Factors for Irrigated Vineyards* (1977); University of California Cooperative Extension, *California Cotton Review* 5-6 (Sept. 1977).

[13] California Department of Food and Agriculture, *Agricultural Resource Directory 2001* at 33.

[14] Interview with Hal Collin, President of Agri-Struction (Mar. 15, 2002). *See also* University of California Cooperative Extension, *Sample Costs to Establish a Manzanillo Olive Orchard and Produce Olives* 4 (1997); University of California Cooperative Extension, *Sample Costs to Establish a Prune Orchard and Produce Prunes* 4 (1997); University of California Cooperative Extension, *Sample Costs to Establish a Fig Orchard and Produce Figs* 4 (1994).

[15] *See* University of California Cooperative Extension, *Sample Costs to Establish an Orange Orchard and Produce Oranges* 4 (1999); University of California Cooperative Extension, *Sample Costs to Establish a Pecan Orchard and Produce Pecans* 4 (1998); University of California Cooperative Extension, *Production Practices and Sample Costs to Produce Loose Leaf Lettuce* 3 (1996); University of California Cooperative Extension, *Sample Costs to Establish an Apple Orchard and Produce Apples* 3 (1994).

compacted to allow the water to reach the roots of the crop. California's farming families often need to plow deeply to convert land from less productive agriculture, such as raising forage, to more productive agriculture, such as orchards, vineyards, alfalfa, and certain vegetable crops. This kind of plowing is done at depths greater than 16 inches and can exceed 4 feet.[16] However, under the Ninth Circuit's decision below federal government officials with little or no knowledge of agricultural operations or soil science have the statutory power to remove from these families the critically important decision of which crops to grow and how to manage their agricultural operations.

Ranchers and farmers are faced with formidable pressures to maintain profitability or convert their lands from agriculture to other uses. For instance, between 1964 and 1997, the amount of land used for agriculture in this country dropped about 16% to less than 932 million acres.[17] In California, the most productive agricultural state in the country,[18] agricultural land use dropped by well over 9 million acres during the same period—37 million to 27.7 million acres, a 25% reduction.[19]

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[16] *See* Footnote 3, *infra*.

[17] Kumiroff, Nicolai V., Sumner, Daniel A. & Goldman, George, *The Measure of California Agriculture 2000*, University of California Agricultural Issues Center, November, 2000, at 11.

[18] California Department of Food and Agriculture, *Agricultural Resource Directory 2001* 30.

[19] Over a quarter of California's landmass is used for agriculture (down from over a third as recently as 1964). Just over half of the 27.7 million acres of agricultural land is pasture and range and about 39% is cropland. Most California farms are small in terms of cash receipts and total sales, and are family or (continued...)

Between 1988 and 1998 over 420,240 acres in agricultural production were converted to urban and built up uses.[20] The Central Valley, with about 64% of California's cropland, recorded 44% of statewide cropland conversion out of agriculture between 1988 and 1998. Valley grazing land, about 44% of state total, contributed 27% of total grazing land conversions.[21]

As is evidenced by the facts of this case, decisions imposed under section 404 can have devastating effects on the usability and profitability of agricultural land. The Ninth Circuit's decision ignored the intent of Congress not to impede normal farming activities with the Clean Water Act Section 404 program,[22] and sanctioned new burdens that will force more farm land into nonagricultural uses. For example, if Parkfield, California, rancher and farmer Kevin Kester had been unable to convert 51 acres of his grazing land in 1998 to vineyards, he would have been forced to sell some of his land for nonagricultural uses.[23] The conversion from rangeland to fully planted vineyards enabled Mr. Kester to increase his cash flow to pay estate taxes and avoid the last option of selling off part of his property. However, if Mr. Kester had been subject to the Ninth Circuit's *Borden Ranch* decision, he would not have been

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[19] (...continued)
individually operated. California has a greater share of female farm operators and farms with Hispanic, Asian and Pacific Islander backgrounds than the United States as a whole.

Kumiroff, *et al.*, at 7.

[20] Kumiroff, *et al.*, at 16.

[21] Kumiroff, *et al.*, at 19.

[22] 33 U.S.C. § 1344(f)(1)(A).

[23] Interview of Kevin Kester (Mar. 12, 2002).

able to convert to grapes in a timely manner, if at all. It could have taken well over a year just to get the Section 404 permit needed to make the conversion.[24] Because the *Borden Ranch* decision did not apply to his operation, he was able to act quickly and keep all his acres in agriculture.[25]

This pressure to sell off land is an all too frequent occurrence. Estate taxes, property taxes, market conditions, urban encroachment, changes in water availability, environmental regulation, and a host of tensions work against farming. Farmers must retain flexibility in their operations and an ability to make decisions quickly so they can withstand these difficult financial pressures. Congress recognized the need for flexibility in agricultural operations and excluded normal farming practices from the burdensome permitting requirements of the Clean Water Act. The Ninth Circuit's decision puts the federal government at the controls of the farmer's plow. Unless overturned by this Court, that decision will present another in a long list of adverse financial pressures working against California's family farmers.

B. Congress Did Not Intend to Regulate Plowing as a Discharge Under Section 404

Ranchers and farmers regularly convert from one crop to another as part of normal farming operations. *Supra* at 15-17. Economic exigencies often call for it. Congress knew this and passed the Clean Water Act in 1972 not intending section 404

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[24] One study showed that the average amount of time necessary to obtain a Section 404 permit was 373 days. Goode, Bernard & Albrecht, Virginia, *Wetland Regulation in the Real World*, ALI-ABA Course of Study Materials, Vol. 1 (Feb. 1994).

[25] Farms provide significant open space and ecologically valuable habitat for local flora and fauna. Indeed, 75% of the nation's wildlife lives on farms and ranches. California Farm Bureau Federation, *Facts & Stats About California Agriculture* (2002).

to apply to such normal farming activities. However, the Corps of Engineers did not always observe this intent, nor did the courts. Consequently, after several years watching the courts and Corps of Engineers inconsistently interpreting the law, Congress passed amendments to the Clean Water Act in 1977 to eliminate unequivocally most applications of the section 404 permit program to farming as Congress "emphatically did not want the law to impede these bucolic pursuits," *National Mining Association*, 145 F.3d at 1405.[26] Specifically, section 404(f)(1)(A) was added to expressly eliminate any requirement to obtain a permit for "discharge: (A) from normal farming . . . and ranching activities such as plowing." 33 U.S.C. § 1344(f)(1)(A).

The legislative history of the 1977 Amendments to the Clean Water Act provides a vivid road map of Congress' efforts to clarify what it intended in 1972. Unfortunately, the Ninth Circuit took a wrong turn in its decision below giving this history little notice. Congressman Roberts, one of the key

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[26] As expressed by Senator Muskie in debate over the Senate bill that became the bill adopted in conference as the 1977 amendments to the Clean Water Act:

> The initial response to **section 404** was to interpret it so as to extend its potential jurisdiction over those normal activities which would subject citizens to overregulation, and we all began to get letters protesting that potential intrusion upon their normal activities.
>
> Every proposal before this Senate, every one, is designed to exempt those normal activities from that kind of overregulation by the Corps of Engineers or anybody else. . . .
>
> . . . .
>
> What types of farming and forestry practices are exempt from permit requirements under the committee bill? Let me list them: Normal farming and forestry activities such as plowing . . . .

4 1977 Leg. History at 928.

House managers of the 1977 Act's conference committee, provided a thorough explanation of the new amendments as well as a short history lesson on the implementation problems experienced with section 404 of the 1972 Act.

> In 1972, when Congress passed the comprehensive amendments to the Federal Water Pollution Control Act, it established in **section 404** of that act a new permitting authority for the discharge of dredged or fill materials in navigable waters, superseding the 1899 act for these two activities. The Corps of Engineers, in implementing **section 404**, applied it to the same waters as those over which it exercised jurisdiction under the 1899 act—the navigable waters of the United states. A suit was brought in the U.S. District Court for the District of Columbia alleging that **section 404** was not being interpreted broadly enough and the court agreed, ordering the corps to publish revised regulations correctly interpreting the phrase "navigable waters. *N.R.D.C. v. Calloway* (392 F. Supp. 687 1975)."[27]

3 1977 Leg. History at 351.

As a result of the litigation, the Corps published regulations on July 25, 1975, which were later amended on July 19, 1977. Of particular significance to this case was Congressman Roberts' understanding that these regulations, promulgated to expand the scope of areas and activities subject to section 404, nevertheless "make it clear, as did the 1975 regulations, that plowing, seeding, cultivating, and harvesting

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[27] This Court revisited the term "navigable waters" in *SWANCC*, 531 U.S. 159, finding the regulations the Corps had published pursuant to the NRDC litigation which interpreted the phrase "navigable waters" to include "isolated waters" were unlawful because they read "navigable" right out of the definition.

for the production of food, fiber, and forest products are not included in the **section 404** program." *Id.* Yet Congress was concerned after the NRDC litigation that the 404 program could be interpreted by the courts to apply to normal farming since it was not expressly stated to the contrary in the 1972 Act.[28]

Congressman Roberts went on to explain that the 1977 Amendments were designed to obviate that concern by creating express exemptions for normal farming activities like plowing. As announced by the Congressman, "we will now have for the first time statutory recognition that normal farming, ranching and silviculture activities do not belong in this permit program. These exemptions reemphasize that Congress never intended these activities to be considered discharges of dredged or fill material." 3 1977 Leg. History at 351.[29]

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[28] Conference Report manager, Senator Jennings Randolph explained:

> One of the most controversial of [the issues in the 1977 Amendments to the Act] relates to the regulation of disposal of dredge and fill material, resulting from a judicial decision as to the authority and responsibility of the Army Corps of Engineers under section 404 of the 1972 act. That decision resulted in widespread concern that many activities usually considered routine would be prohibited or made extremely difficult because of the complex regulatory procedure set up by the corps unless there was a new statement of congressional intent.

3 1977 Leg. History at 494.

[29] Congressman Stump explained that "[t]he conferees have clarified that plowing . . . [was] not intended to require Section 404 permits." 3 1977 Leg. History at 420. Later in debate, Senator Stafford further clarified the conference report explaining that

> the bill includes the clarification that permits are not required for certain normal farming activities such as plowing and seeding which are not discharges of dredged or fill material.

(continued...)

Senator Muskie, in presenting the conference report to the Senate, could not have made the point any more cogently stating: "The conferees have adopted the Senate's explicit approach for clarifying that plowing, seeding, cultivating, harvesting . . . were not intended to require section 404 permits. Such exemptions were provided by the Corps of Engineers' regulations under the current law." 3 1977 Leg. History at 474. Specifically, plowing was not intended to require section 404 permits, and the exemptions in the bill were explained as emulating what was already found in the Corps' own regulations which expressly "make it clear that . . . plowing . . . for the production of food . . . products [is] not included in the section 404 program." 3 1977 Leg. History at 348.[30]

As vigorously and repetitiously explained in the legislative history of the 1977 Clean Water Act Amendments, Section 404 was amended to allow, *without a permit*, normal farming and ranching activities such as plowing, seeding, cultivating, and harvesting for the production of food and fiber. 33 U.S.C. § 1344(f)(1)(A).[31]

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[29] (...continued)
3 1977 Leg. History at 485. He also explained that other farming activity that would "connect water to dry land including, for example, those occasional farm or forestry activities that involve dikes, levees or other fills in wetland or other waters," *activities unlike plowing*, would still require a permit. *Id.*

[30] Senator Wallop explained that section 404 as amended would relieve agriculture "of irrelevant or unnecessary burdens," referring to a farmer not having to obtain a 404 permit to plow his fields. 3 1977 Leg. History at 530, 533.

[31] Of particular importance to agriculture in California, this subsection does not limit itself to certain types of plowing. In fact, the government has never recognized any such limitations, or degrees of plowing in its own regulations. *See* 33 C.F.R. § 323.2(f); 40

(continued...)

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[31] (...continued)
C.F.R. § 232.3(c)(1)(i). When defining what the term "discharge of fill material" means, the Corps of Engineers categorically states that "the term does not include plowing." 33 C.F.R. § 323.2(e). EPA's regulatory definition for plowing, 40 C.F.R. § 232.3(D)(4), expresses the same conclusion:

> Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops . . . . Plowing, as described above, will never involve a discharge of dredged or fill material.

Thus, all plowing, including deep plowing, must be a normal farming activity within the meaning of Section 404(f)(1)(A), or it *would not* be expressly excluded from the meaning of "discharge of dredged or fill material" by the Corps' and EPA's own regulations.

However, the Corps unilaterally decided in a December 12, 1996, joint Corps/EPA memorandum to the Field, without formal rule making, that the deep plowing needed to prepare compacted soil for vineyards or orchards does not constitute a "normal farming" activity. (*See* Petitioner's Appendix at 4, 199-207; RGL 96-02.) This interpretation is not entitled to serious deference however as it is not the result of "a formal adjudication or notice-and-comment rulemaking," *Christiensen v. Harris County*, 529 U.S. 576, 587 (2000). *But see United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001). Moreover, the Corps' new informal interpretation is not of long duration and is not even internally consistent as it contradicts a previous Corps' interpretation which came to the exact opposite conclusion. *See* RGL 86-01, lodged with the Court by Petitioners, which stated that any plowing for the production of a crop [vineyards and orchards] is not a discharge and is not even subject to section 404(f) exemptions. *See also General Electric Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (discounting significance of agency interpretive guideline promulgated eight years after statute's enactment, although

(continued...)

C. The Ninth Circuit's Reliance on *Akers* Was Misplaced

Congress expressly established section 404 permitting exemptions for plowing in 33 U.S.C. § 1344(f)(1)(A). That section exempts any "discharge: (A) from *normal farming*, . . . and *ranching activities such as plowing*." In total disdain for congressional will expressed in the 1977 amendments to the Clean Water Act and their legislative history, the decision below ruled that even if the deep plowing were exempt, subsection (f)(2) provides an exception to any plowing exemptions that could be applied to Borden Ranch. *Borden Ranch*, 261 F.3d at 815. Subsection (f)(2) is known as the recapture provision. It states:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2).

The Ninth Circuit interpreted this subsection to negate the subsection (f)(1) plowing exemption if a farmer is changing his crop, for example, from seasonal hay or pasture grass to orchards or vineyards and the plowing causes "substantial hydrological alterations." *Borden Ranch*, 261 F.3d at 815-16 (citing *United States v. Akers*, 785 F.2d 814, 820 (9th Cir. 1986)).[32] But the *Akers* decision did not hold that plowing solely done for the purpose of changing crops for the production of food constituted "bringing an area [of the farm] into a use to which it was not previously subject." *Akers* did not deal with plowing. It addressed the conversion of part of the farm known as the Big Swamp to uplands by massive dike building, grading, leveling, and water diversion activities. *Akers*, 785 F.2d at 816. *Akers* dealt with land conversion activities that truly sought to turn land "into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2).

The Ninth Circuit dismissed this distinction and gave little credence to the strong legislative history that repeatedly emphasized the importance of this distinction to ensure that normal farming activities like plowing for the production of food would not be subject to section 404. *See infra* at 22. Instead, the lower court decided that under section 404 the federal government could control what is grown on compacted farm land like that found on Borden Ranch.[33] As this Court

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[31] (...continued)
fact that guideline contradicted agency's earlier position deemed "more importan[t]").

[32] Senator Muskie contradicted the court's conclusion that the Corps could dictate what crops a farmer plants if the new crops required better draining soils. He stated specifically in response to concerns from fellow Senators that farmers might not be able to change crops under the amended law without a Corps permit, that "if the drainage is being constructed in a field already in agricultural use for crops such as soybeans or corn, the drainage activity would not be subject to any permit under the provisions of the committee bill." 4 1977 Leg. History at 928.

[33] The application of Section 404 is limited by its express terms to "navigable waters." Under *SWANCC*, 531 U.S. 159, waters of the United States subject to Section 404 jurisdiction include wetlands adjacent to traditional navigable waters, possibly including adjacent nonnavigable tributaries and streams. *Id.* at 172. However, it is undisputed that Borden Ranch did not conduct plowing activities in wetlands adjacent to either traditional navigable waters or (continued...)

recognized in *SWANCC*, in addressing the jurisdictional scope of the Section 404 program, "[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve and protect the primary responsibilities and rights of states . . . to plan the development and use . . . of [their] land and water resources' . . . 33 U.S.C. § 1251(b)." *SWANCC*, 531 U.S. at 174. The Ninth Circuit ignored this principle and as a consequence threatens the livelihood of scores of family farmers in California as well as across the nation.

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[33] (...continued)
nonnavigable tributaries or streams. It was charged instead with plowing heavily compacted soils in certain isolated seasonal drainage swales. But, as indicated in *Rice v. Harken Exploration Co.*, 250 F.3d 264, 271 (5th Cir. 2001), it would be an unwarranted expansion of the Clean Water Act to find that a discharge onto land that only infrequently carries running water is a discharge into navigable waters. The Ninth Circuit's decision below sanctioned just such an expansion. *See also United States v. Newdunn Associates*, 195 F. Supp. 2d 751, 765-66 (E.D. Va. 2002) (no Section 404 jurisdiction over surface water that drains into a series of ditches that drain into navigable water body); *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1015 (E.D. Mich. S.D. 2002) (no Section 404 jurisdiction over wetlands draining into nonnavigable creeks that drain into navigable water body over 20 miles away).

CONCLUSION

For the foregoing reasons, Amici respectfully submit that because plowing does not cause the "discharge of a pollutant," it is not subject to section 404 permitting jurisdiction. The decision of the court below should be REVERSED.

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IN THE
Supreme Court of the United States

BORDEN RANCH PARTNERSHIP, *et al.*,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN FOREST & PAPER ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief addresses only the second of three questions presented by Petitioners:

Whether deep plowing ranchland that is farmable in its natural state to plant deep-rooted crops is statutorily exempt from regulation under Clean Water Act section 404(f)'s exemption for any discharge from "normal farming ... activities such as plowing...."

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INTEREST OF *AMICUS CURIAE*

American Forest & Paper Association ("AF&PA") is the national trade association for the forest, pulp, paper, and wood products industry.[1] AF&PA represents approximately 130 member companies that grow, harvest, and process wood and wood fiber; manufacture pulp, paper, and paperboard products from both virgin and recovered fiber; produce solid wood products; and import and export unmanufactured wood products. AF&PA is also the umbrella for more than 60 affiliate member associations that provide outreach to more than 10,000 companies.

The Clean Water Act ("CWA") section 404(f) permitting exemption for "normal farming, silviculture, and ranching activities" – and the "recapture" provision that eliminates that exemption for certain activities – are of vital interest to AF&PA's members. Normal silvicultural activities such as timber harvesting, minor drainage, plowing, seeding, and cultivating are essential management practices in many wetland forests. Such activities often *necessarily* involve the minor or temporary modification of wetland hydrology and yet are fully compatible with long-term operations that maintain the wetland's status and function.

These activities are essential to ongoing forestry operations on millions of acres of privately owned forested

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[1] Letters indicating the parties' consent to the filing of this *amicus curiae* brief have been filed with the Clerk of the Court. Pursuant to this Court's Rule 37.6, AF&PA states that counsel for a party did not author this brief in whole or in part and that no person other than AF&PA made a monetary contribution to the preparation or submission of this brief.

wetlands across the United States. Moreover, although forestry is fully compatible with the wetland characteristics of these areas, these normal forestry activities sometimes fall within the expansive definition of a "discharge of dredged or fill material" into "navigable waters" under the CWA (particularly as interpreted by the court below). Thus, many U.S. forestry operations rely on the CWA section 404(f) exemption to conduct their operations without the delay, expense, and red tape of seeking CWA permits for these activities.

AF&PA's interest is not in the particular outcome of this case in terms of whether the "deep plowing" activity at issue is viewed as exempt or not exempt. Instead, AF&PA's interest is in the Court's analysis of CWA section 404(f)'s normal farming, forestry, and ranching exemption and recapture provision, in the event that the Court reaches those issues. AF&PA wishes to ensure that these provisions are interpreted in a manner that preserves the exempt status of normal forestry activities that are consistent with maintaining ongoing operations in a wetland setting.

SUMMARY OF ARGUMENT

AF&PA endorses – and will not repeat – the view of Circuit Judge Gould and the Petitioners that the mere disturbance of soils by plowing cannot constitute the "addition" of dredged or fill material (or any other pollutant) and therefore cannot trigger regulation under CWA section 404. This brief concerns only the questions that arise if the Court finds that Petitioners' deep plowing activity *did* cause a "discharge" of dredged or fill material under the CWA. In that event, two questions must be addressed to determine whether the discharge is nevertheless exempt from regulation. Those questions are: (1) did the discharge result from a "normal" farming, silviculture, or ranching activity

within the meaning of CWA section 404(f)(1)? and (2) if so, is the discharge "recaptured" for CWA regulation by virtue of section 404(f)(2)? AF&PA does not discuss these questions with reference to the "deep plowing" activity at issue in this case. Instead, AF&PA provides additional views to assist in the Court's analysis of section 404 in a manner that achieves the purposes of the statute with respect to a broader universe of activities and a larger community of operations that rely on the exemption. Specifically, AF&PA urges the Court to consider the following points when interpreting the section 404(f) exemption:

1. Consistent with the language and purpose of the section 404(f) exemption, "normal" farming and forestry activities may encompass a wide range of practices, some of which *necessarily* involve minor or temporary changes to wetland hydrology. Several of the forestry activities expressly identified as "normal" in section 404(f), for example – including minor drainage, harvesting, and seeding – invariably cause temporary changes to wetland hydrology and yet are fully compatible with maintaining a wetland's status and function over the long term. The exemption of such activities from CWA regulation – despite their incidental impact on wetlands – is precisely the purpose of section 404(f).

2. "Normal" activities also encompass changes in management practices and technology over time. Because the purpose of section 404(f) is to facilitate long-term farming and forestry operations in wetland environments, the exemption for "normal" activities must accommodate improvements in technologies and practices. Thus, activities may be "normal" even if they are not accomplished through "traditional" techniques.

3. If an activity is "normal" within the farming, forestry, or ranching community as a general matter, discharges incidental to that activity at any particular location nevertheless may be subject to CWA regulation pursuant to the "recapture" provision. Under the plain language of CWA section 404(f)(2), however, "recapture" occurs only where *two* elements are present: (1) the purpose of the activity is to bring an area of the "navigable waters" into a use to which it has not previously been subject; *and* (2) the activity may impair the flow or reduce the reach of such navigable waters. These two elements work together to avoid CWA permitting requirements for farming and forestry operations that are compatible with wetland environments. Any interpretation of section 404(f) that allows regulation of normal farming and forestry activities on the basis of either element alone would defeat Congress's purpose of exempting such operations. In particular, a one-part recapture test based solely on the second element of the statutory test (impairing the flow or reducing the reach of waters) would jeopardize the exemption for innumerable on-going wetland farming and forestry operations that necessarily cause minor or temporary wetland impacts (see 1. above).

ARGUMENT

I. EXEMPT "NORMAL" FARMING, FORESTRY, AND RANCHING ACTIVITIES MAY AFFECT WETLAND HYDROLOGY.

Section 404 of the 1972 CWA established a federal permitting program for any "discharge" of "dredged or fill material" into "navigable waters." *See* Pub. L. No. 92-500, § 404, 86 Stat. 816, 884 (1972) (codified at 33 U.S.C. § 1344). After courts interpreted the term "navigable waters" to include certain wetlands, section 404 permitting

became the primary CWA program affecting activities in wetlands, although the word "wetlands" appears nowhere in that section. Responding to wide-spread public concern over federal regulation of routine land use activities that often occur in wetland areas, such as farming and forestry, in 1977 Congress enacted section 404(f) as a qualified exemption for certain discharges for which federal permitting was deemed unnecessary and unduly burdensome. *See* Pub. L. No. 95-217, § 67, 91 Stat. 1566, 1600-01 (1977) (codified at 33 U.S.C. § 1344(f)).[2]

Section 404(f)(1)(A) exempts any discharge of dredged or fill material that results from:

> normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting ..., or upland soil and water conservation practices

33 U.S.C. § 1344(f)(1)(A). The remainder of section 404(f)(1) identifies other activities whose discharges are exempt, including maintenance of dikes, dams, and levees; maintenance of drainage ditches; and construction or maintenance of farm or forest roads where those activities meet specified "best management practices" to minimize adverse effects on the aquatic environment. *Id.* § 1344(f)(1)(E)-(F). The exemption of these activities is limited by section 404(f)(2) (the "recapture" provision), which provides for regulation if the discharge-generating activity is for the purpose of "bringing an area of the

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[2] Section 404(f) exempts specified discharges from permitting requirements under both CWA section 404 (dredge and fill permitting) and section 402 (permits for "discharges" of "pollutants" other than dredged or fill material). *See* 33 U.S.C. § 1344(f)(1).

navigable waters into a use to which it was not previously subject," where the water's flow or circulation may be impaired or its reach may be reduced. *Id.* § 1344(f)(2).

The statute does not define "normal" farming or forestry activities, other than by providing a list of such activities. The phrase "such as," however, makes clear that the list is illustrative, rather than exclusive. The term "normal" for purposes of section 404(f)(1) thus should be interpreted in accordance with its ordinary meaning, illuminated by the examples provided. *See Asgrow Seed Co. v. Denny Winterboer, et al.*, 513 U.S. 179, 187 (1995) (statutory terms that are not defined are given their ordinary meaning); *Norfolk & Western Ry. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991) (general term should be construed as referring to items similar to specifically enumerated items).

The language of the exemption and the list of examples reveal that "normal" activities encompass a wide variety of earth-disturbing practices – some of which necessarily cause minor or temporary changes to wetland hydrology. "Minor drainage," for example – which is expressly identified as "normal" in section 404(f)(1) – by its terms involves *drainage*, *i.e.*, a reduction in water levels. "Harvesting" of trees in wetland forests, on the other hand, can cause temporary but significant *increases* in water levels, due to the loss of the removed trees' capacity for transpiration of water into the atmosphere. After harvest, "seeding" in wetland areas typically involves the placement of elevated soil beds to improve seedling survival and growth, which incidentally alters surface water flow in the area of the beds.

Although each of these activities causes temporary changes to wetlands, each is also fully compatible with maintaining the wetland's overall status and long term functioning. The exemption of discharges associated with

these activities thus precludes federal regulation *notwithstanding* the activities' incidental impacts on wetlands. *See* 123 Cong. Rec. 39,188 (1977) (Senator Muskie's comment that "it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources"), *reprinted at* 3 A Legislative History of the Clean Water Act of 1977, A Continuation of the Legislative History of the Federal Water Pollution Control Act (1978) ("1977 Leg. Hist.") at 474. This is consistent with the balance struck by Congress to prevent the destruction of wetlands, while minimizing regulation of operations capable of using wetlands productively. *See* 123 Cong. Rec. 39,192 (1977) (Senator Stafford's comment that exemptions were adopted "to prevent over-regulation of activities that have little or no effect on the aquatic environment" but that regulation would continue for activities that convert water to dry land), *reprinted at* 3 1977 Leg. Hist. at 485; 123 Cong. Rec. 39,210 (1977) (Senator Wallop's remarks that the section 404 amendments were "carefully worded to provide protection from harmful activities, while reducing unnecessary government interference"), *reprinted at* 3 1977 Leg. Hist. at 528-29.

This careful balance is wise indeed, as the exemption of these wetland uses may well contribute more to wetland protection than would regulation. With tens of millions of wetland acres in private ownership, laws that facilitate the compatible productive use of these areas (*e.g.*, farming and forestry) can only diminish economic incentives to sell them into other uses that may be less compatible with their wetland character (*e.g.*, suburbs and shopping malls). For the exemption to function as intended, however, any interpretation must recognize that it exempts "normal" farming and forestry activities *regardless* of their incidental

impacts on wetlands, subject only to the limited "recapture" provision (discussed in Section III below).

II. EXEMPT "NORMAL" FARMING, FORESTRY, AND RANCHING ACTIVITIES NEED NOT USE TRADITIONAL TECHNIQUES.

Petitioners point out that this case concerns "traditional" plowing activity. *See, e.g.*, Pet. Br. at 2, 17, and 19. Farming, forestry, and ranching activities may be "normal," however, even if they are not accomplished through "traditional" means. Farming and forestry practices are not static, but evolve continually to reflect technological advancements, more efficient and productive management methods, and improvements in environmental practices. Because the purpose of the section 404(f) exemption is to facilitate *continued* farming and forestry in wetland environments, any judicial interpretation of the exemption must accommodate new practices consistent with modern operations.

In this context, normal *activities* – such as plowing, seeding, cultivating, and harvesting – connote the *function* being served, as opposed to the *technique* employed. Raising crops, timber, and livestock normally involves such *functions* as preparing and improving soils, establishing and protecting desired vegetation, controlling undesired or competing vegetation, harvesting crops, herding animals, and so on. New *techniques* continually evolve to better accomplish these fundamental objectives, and no operation's regulatory status under section 404 should hinge on its willingness to resist innovation. Thus, the relevant question in determining whether an activity is "normal" is not whether timber is fertilized from the ground or from the air, whether animals are herded on horseback or on all-terrain vehicles, or whether plows are pulled by mules or by tractor. Instead, the

relevant question is whether the activity performs a fundamental function associated with keeping lands in farming, forestry, or ranching use.

III. THE TWO ELEMENTS OF THE "RECAPTURE" PROVISION WORK TOGETHER TO MINIMIZE UNNECESSARY FEDERAL REGULATION OF FARMING, FORESTRY, AND RANCHING.

If an activity is "normal" within the farming, ranching, or forestry community as a general matter, discharges of dredged or fill material incidental to that activity at any particular location nevertheless may be subject to CWA regulation pursuant to the "recapture" provision. Under the plain language of CWA section 404(f)(2), however, "recapture" occurs only where *two* elements are present: (1) the purpose of the activity is to bring an area of the "navigable waters" into a use to which it has not previously been subject; *and* (2) the discharge may impair the flow or circulation, or reduce the reach, of such navigable waters. *See* 33 U.S.C. § 1344(f)(2). The United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("the Corps") have explicitly recognized the two-part test for recapture, explaining that:

> [The recapture provision] involves a two-part test that results in an activity being considered *not* exempt when both parties [sic] are met: 1) does the activity represent a "new use" of the wetland and, 2) would the activity result in a "reduction in reach/impairment of the flow or circulation" of waters of the United States?

United States Environmental Protection Agency and United States Department of the Army, Memorandum for the Field,

"Clean Water Act Section 404 Regulatory Program and Agricultural Activities" (May 1990) at 2.[3] *See also*, United States Environmental Protection Agency, Memorandum from Gerald H. Yamada, EPA Acting General Counsel to Josephine S. Cooper, EPA Assistant Administrator for External Affairs (Feb. 8, 1985) ("EPA General Counsel Mem."), 1985 WL 71787 (E.P.A.G.C.), at 6 ("section 404(f)(2) has two requirements: the 'new use' requirement, and the 'reduction in reach/impairment of flow ... [B]oth requirements must be met ....).

The Ninth Circuit's opinion in this case suggests that the panel majority found both elements satisfied. *See* 261 F.3d at 815 ("Converting ranch land to orchards and vineyards is clearly bringing the land 'into a use to which it was not previously subject,' and there is a clear basis in this record to conclude that the destruction of the soil layer at issue here constitutes an impairment of the flow of the nearby navigable waters."). Other aspects of the opinion, however, articulate an overbroad standard for recapture by essentially reading the "change in use" requirement out of the statute. Observing that Congress intended to "prevent the conversion of wetlands to dry lands," the court declares that activities are non-exempt where they "*change a wetland's hydrological regime*." *Id.* at 816. In this respect, the opinion suggests – wrongly – that a "change in a wetland's hydrological regime" *alone* will result in "recapture" and regulation, *regardless* of whether the wetland is being brought into a new use.

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[3] This Memorandum is available through EPA's internet web site at <http://www.epa.gov/owow/wetlands/cwaag.html> and <http://www.epa.gov/egi-bin/epaprintonly.cgi>.

This *one-step* recapture test based solely on a "change [in] a wetland's hydrological regime" contradicts the plain language of section 404(f)(2) as discussed above. Moreover, it would defeat the purpose of the exemption by sweeping innumerable normal wetland farming and forestry activities into the mire of CWA permitting. As noted in Section I, many existing forestry operations in wetland areas engage in essential activities that cause changes – sometimes substantial, albeit temporary, changes – to wetland hydrology. Such on-going operations are unquestionably intended to benefit from the section 404 exemption *notwithstanding* their recognized incidental impacts on wetlands. *See supra* pp. 6-7. Yet they would lose their exempt status if they were subject to regulation by virtue of their potential to "change a wetland's hydrological regime." The Ninth Circuit's one-step recapture test thus violates both the plain language and the clear purpose of section 404(f).

In establishing a one-part recapture test based solely on potential impacts to wetland hydrology, the panel appears to have misconstrued a particular recapture analysis established by regulation for activities that permanently *convert* wetlands to dry land. Based on the same legislative purpose mentioned by the panel – the desire to prevent the conversion of wetlands to dry land – EPA and the Corps promulgated regulations providing that the *conversion* of wetlands to dry land is a *presumptive* "change in use." *See* 40 C.F.R. § 232.3(b) (2001) ("A conversion of section 404 wetland to a non-wetland is a change in use of an area of waters of the U.S."); 33 C.F.R. § 323.4(c) (2001) (Corps regulation containing identical statement). Therefore, by regulation, any activity that permanently changes a wetland to dry land automatically satisfies *both* elements of the two-part "recapture" test: (1) the activity is deemed to effect a "change in use" (*i.e.*, a change from wetland use to non-

wetland use), and (2) because it converts wetland to dry land, the activity necessarily involves a reduction in the reach of the wetland. Discharges associated with otherwise "normal" farming or forestry activities that are used to permanently convert wetlands to non-wetlands thus are always "recaptured" under this regulatory interpretation.[4]

This special regulatory application of the recapture test essentially prevents the abuse of the exemption to destroy wetlands under the guise of on-going wetland farming, forestry, or ranching operations. It does not, however, alter the fundamental two-part recapture test that requires *both* a "change in use" *and* an impairment in flow or reduction in reach of a navigable water. Thus, discharges in connection with the activities of established farming or forestry operations (*i.e.*, where the first part of the test is not met) remain exempt even if they incidentally impair a wetland's flow or reduce its reach (*i.e.*, even if the second part of the test is met). A 1985 EPA General Counsel Memorandum explains in detail how the two-part test recaptures discharges associated with activities that *destroy* wetlands, while preserving the exemption for established wetland operations that *affect* wetlands without destroying them:

> The legislative history ... leaves no doubt that the *destruction of the wetland character of an area (i.e., its conversion to uplands) is a change in use of the waters of the United States, and by definition also a reduction in their reach*, within the meaning of section 404(f)(2). The fact that some farming operations may have previously been conducted in the wetland without altering its wetland status, or that some new operation could theoretically be conducted without a discharge, does not mean that discharges associated with an operation which does convert the wetland are exempt. *Conversely, if there is already an established farming operation in a wetland, any discharges resulting from farming activities listed in the regulation which do not convert the wetland to upland are exempt, whether or not there is an intensification of farming, change in crops, etc.* Similarly, discharges from the construction of an irrigation ditch are exempt, even if they affect a wetland, as long as they do not convert the wetland to upland, bring it into an initial farming use, or otherwise bring a water of the United States into a new use, and reduce or impair its reach, flow, or circulation.

EPA General Counsel Mem. at 6-7.[5]

Although the Ninth Circuit seems to have concluded that the deep plowing at issue both: (1) brought navigable waters into a use to which they had not been subject (by plowing ranchland to prepare it for planting orchards and crops), and (2) *impaired the flow* of those waters, its opinion wrongly

[4] It bears emphasis that even if an activity converts a wetland to dry land, CWA permitting requirements apply only if there is also a "discharge" (*i.e.*, an "addition") of dredged or fill material. *See* 33 U.S.C. § 1344(a). The CWA regulates *discharges*, not *activities* with particular environmental effects. As noted in Judge Gould's dissent below: "Congress prohibited the discharge or addition of any pollutant to navigable waters from any point source. It did not literally prohibit any conduct by farmers or ranchers that changes the hydrological character of their land." 261 F.3d at 821.

[5] The quoted portion of the EPA General Counsel Memorandum cross references CWA legislative history discussed several pages before, including statements by Senators Muskie (3 1977 Leg. Hist. at 474), Stafford (*id.* at 485), and Baker (*id.* at 523).

indicates that such a *change in wetland hydrology alone* is sufficient to negate the section 404(f) exemption. To the contrary, even under EPA's broad regulatory interpretation of the two-part statutory recapture test, the only wetland impact that presumptively satisfies both elements of the test is the permanent conversion of a wetland to a non-wetland. Under section 404(f)(2), any "normal" farming, forestry, or ranching activity that has lesser wetland impacts (*i.e.*, that impairs a wetland's flow or reduces its reach without changing its overall wetland status) remains exempt unless the purpose of the activity is to bring the wetland into a use to which it has not previously been subject.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed on the grounds that the disturbance of wetland soils by plowing is not the "addition" of dredged or fill material to navigable waters. However, to the extent that the Court addresses the CWA section 404(f) exemption and "recapture" provision for "normal" farming, forestry, and ranching activities, AF&PA respectfully asks that the Court correct the Ninth Circuit's flawed analysis of those provisions. The section 404(f) exemption can serve its purpose of protecting compatible wetland farming and forestry operations from the unnecessary burdens of CWA regulation only if the normal activities of established wetland farming and forestry operations are recognized as exempt, regardless of minor or temporary changes to wetland hydrology.

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Supreme Court of the United States

Borden Ranch Partnership,
Angelo K. Tsakopoulos,

Petitioners,

v.

United States Army Corps of Engineers,
United States Environmental Protection Agency,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, ILLINOIS, KANSAS, LOUISIANA, NEBRASKA, OHIO, PENNSYLVANIA, TEXAS, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae States of Alabama, Alaska, Illinois, Louisiana, Nebraska, Ohio, Pennsylvania, and Virginia submit this brief, pursuant to Sup. Ct. R. 37.4, in support of the petitioners, Borden Ranch Partnership and Angelo K. Tsakopoulos, urging this Court to reverse the judgment of the Ninth Circuit Court of Appeals. Amici have an interest in preserving the framework of cooperative federalism established by Congress in the Clean Water Act, and in maintaining the authority to regulate "normal farming activity" that Congress reserved for the States in the Act. The State of Alabama is a home to many farmers, and the interpretation of the Clean Water Act given by the Ninth Circuit is inimical to the interests of farmers. The petitioners' deep plowing of farmland is an activity that Congress left to state regulation and that Congress purposefully exempted from federal government regulation. Amici submit this brief to urge a return to the plain language of the Act, to defend the demarcations set forth in the Act between federal and state authority, and to protect the rights of States to regulate their own land and water to the extent provided by Congress.

SUMMARY OF ARGUMENT

The question before this Court is whether the federal government has authority to regulate the deep plowing of land, which does nothing but move soil around and adds nothing to the soil. The Clean Water Act did not give this authority to federal government agencies; instead, it reserved it to the States. The plain language of the Act and its legislative history show that

States have jurisdiction over nonpoint source pollution and farming activities. The Ninth Circuit's opinion places at risk the balance of powers between federal and state governments established by the Act.

Among the express purposes of the Act was to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. . . ." 33 U.S.C. 1251(b). Congress was careful to preserve the States' rights to regulate their own land and water and to leave the States authority over land and water uses not under federal jurisdiction. This Court recently addressed the federal government's impermissible expansion of its jurisdiction and recognized that Congress did indeed create a balance of power between federal and state governments in the Act. *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001). This Court is again called upon to preserve the framework of cooperative federalism created by the Act and to check the runaway federal agencies that seek to expand their own jurisdiction at the expense of the States.

To have jurisdiction over Mr. Tsakopoulos's deep plowing, the respondent federal agencies had to concoct a uniquely creative interpretation of the Act. The Act required Mr. Tsakopoulos to obtain a federal permit only if the deep plowing were deemed to discharge a pollutant into navigable waters. 33 U.S.C. 1311(a); 1344(a). Because "discharge" is defined to be the "addition" of a pollutant from any point source, the agencies had to argue – and the Ninth Circuit had to accept – that deep plowing is an "addition," even

though it just moves the soil around and adds nothing to the soil. *Borden Ranch Partnership* v. *United States Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001). This interpretation of the word "addition" flies in the face of common sense. As the D.C. Circuit has held in an analogous context, "we fail to see how there can be an addition of *dredged material*, when there is no addition of *material*." *National Mining Association* v. *U.S. Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998) (emphasis in original).

To twist the Act to their purposes, the respondent agencies and the Ninth Circuit further had to treat the tractors and bulldozers pulling the plows as "point sources." The Act defines a point source as a "discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. 1362(14). Although bulldozers may in some instances be point sources, depending on the attachments used and activities performed, the bulldozers and tractors that pulled plows in this case were not point sources because they did not discharge any material.

Even if Mr. Tsakopoulos's deep plowing did somehow meet these conditions, it should still qualify for the Act's permitting exemption for normal farming activities, of which plowing is specifically named as one. 33 U.S.C. 1344(f)(1)(A). The Ninth Circuit, however, held that the plowing was not exempt because it fell under the exemptions' "recapture provision." This provision states that the discharge of dredged or fill material is not exempt if it is incidental to bringing an area "into a use to which it was not

previously subject." 33 U.S.C. 1344(f)(2). Although Borden Ranch consisted of ranch and crop land, and Mr. Tsakopoulos sought to convert it to land suitable for growing orchards and vineyards, all of which are exempt uses, the Ninth Circuit nevertheless held this to be a new use of the land. This expansive reading of the recapture provision impermissibly expands the authority of the federal government by shrinking the farming exemption. The balance of powers in the Act was established by Congress, and so it is for Congress, not the courts and certainly not the agencies, to alter it.

ARGUMENT

Angelo K. Tsakopoulos deeply plowed his land to convert it from ranchland and cropland to vineyards and orchards (Pet. at 9). Plowing is not an activity requiring a federal permit under the Clean Water Act. Even if it were, it is a normal farming activity exempt from federal permitting requirements under the Act. In spite of these legal constraints, the U.S. Army Corps of Engineers, Environmental Protection Agency, and Ninth Circuit have seen fit to extend the authority of the federal government's jurisdiction to this plowing activity, to the detriment of the authority of the States.

I. The Clean Water Act Preserved The Primary Responsibility Of The States To Prevent, Reduce, And Eliminate Water Pollution.

In the Clean Water Act, Congress declared: "It is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration,

preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. 1251(b) (emphasis added).

Throughout the Act, Congress recognized State authority to regulate pollution and to control the waters within their boundaries. See, e.g., 33 U.S.C. 1251(g) (States' authority to allocate water supply not abrogated by Act); 33 U.S.C. 1288 (States' authority and role in waste treatment management); 33 U.S.C. 1342(b) (States' authority to administer their own programs for discharges into navigable waters); 33 U.S.C. 1344(g)-(j) (States' authority to administer their own programs for discharge of dredged and fill material); 33 U.S.C. 1370 (States' authority to control pollution, unless a State's standard is less stringent than that of the Act).

The Act's legislative history further emphasizes the distribution of authority between the federal and state governments. For example, the report from the Senate Committee amending the bill in 1977 noted that, in 1972, "Congress made a clear and precise distinction" between point sources, under federal regulation, and nonpoint sources, under state regulation. S. Rep. 95-370 at 8, 1977 U.S.C.C.A.N. 4326, 4334. The Act's history also indicates that jurisdictional questions should focus on kinds of "discharge," whether or not it is "point source or nonpoint, whether or not it is major or minor, whether or not it is a conventional activity or a major change in the use of an area." S. Rep. 97-370 at 10, 1977 U.S.C.C.A.N. 4326, 4336.

In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159

(2001) ("*SWANCC*"), this Court preserved the framework of cooperative federalism recognized by the Act. In *SWANCC*, the Corps had asserted jurisdiction over an abandoned sand and gravel pit under its "Migratory Bird Rule," on the ground that many species of migratory birds had been observed on the site. In rejecting the Corps' jurisdiction, this Court stated: "Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S. at 174. This Court further noted that in the Act, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources" rather than to readjust "the federal-state balance." *Id.* (citations omitted).

As Congress saw fit to limit the jurisdiction of the federal government, reserving primary responsibility for the States, it is not for the courts, and certainly not for the federal agencies themselves, to enlarge that jurisdiction. As Judge Gould stated in his dissent from the Ninth Circuit's majority opinion in the instant case, "the judicial determination that a deep plowing technique constitutes a pollution of navigable waters, with no prior adequate guidance from Congress, goes beyond mere statutory interpretation." *Borden Ranch Partnership* v. *United States Army Corps of Engineers*, 261 F.3d 810, 821 (9th Cir. 2001) (Gould, J., dissenting). "The alternatives are an agency power too unbounded or judicial law-making, which is worse." *Id.*

II. Deep Plowing Of Soil Does Not "Add" A "Pollutant."

Mr. Tsakopoulos's deep plowing did not add a pollutant to his soil, so as to require a federal permit under the Act. The Act allows the U.S. Army Corps of Engineers ("Corps") to issue federal permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). The Act makes it unlawful for any person to "discharge" a "pollutant" without complying with its permitting requirements. 33 U.S.C. 1311(a). A "discharge" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(16), (12).

Thus, to require a federal permit, Mr. Tsakopoulos's deep plowing must have constituted the discharge of a pollutant, which is actually the addition of a pollutant into navigable waters from a point source. Although the deep plowing merely churned up the same soil and left it in approximately the same place, the Ninth Circuit nevertheless found this activity to be the addition of a pollutant. *Borden Ranch*, 261 F. 3d at 814-15.

In an uncommon assault on common sense, the Ninth Circuit and several other courts have held that a pollutant is "added" even if no new material or substance is actually added to the soil or water. This confusion appears to have begun inadvertently in *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897 (5th Cir. 1983). In *Avoyelles*, the defendants conducted wide-scale deforestation of an area known as the "Lake Long Tract." 715 F.2d at 901. This process involved

bulldozers fitted with shearing blades that cut timber and vegetation at ground level, which was then raked into windrows and burned, with the ashes spread back onto the ground. *Id.* The clearing and moving of land had the effect of leveling the land in some places. *Id.* at 923. The material removed was not placed in the same form in substantially the same place. It was moved into piles, burned, and spread about the land. *Id.* at 921. Backhoes were used to dig pits to bury debris. *Id.* Unfortunately, the Fifth Circuit used some broad language in holding this activity to be the addition of a pollutant, stating that an addition "may reasonably be understood to include a 'redeposit.' " *Id.* at 923.

Using the broad language of *Avoyelles* as a foundation, other courts have held that re-deposited materials constitute the addition of a pollutant. See *United States* v. *Deaton*, 209 F.3d 331, 333, 337 (4th Cir. 2000) (finding that digging a ditch and piling the excavated land on the sides of the ditch, a process known as "sidecasting," constituted the addition of a pollutant); *Rybachek* v. *United States Environmental Protection Agency*, 904 F.2d 1276, 1285 (9th Cir. 1990) (holding that the return of materials into a streambed in the process of placer mining constituted the addition of a pollutant); *United States* v. *M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (finding that the dredged spoil churned by tugboat propellers — which had dredged a channel, removed vegetation, and deposited the vegetation on sea grass beds — constituted the addition of a pollutant).

Several of these courts support their determinations by pointing to the definition of a "pollutant." The logic

appears to be that, if a pollutant includes substances such as dredged spoil, sand, rock, etc., then the redeposit of it, even if placed back it in approximately the same form in the same place, must constitute an "addition." See, e.g., *Deaton*, 209 F. 3d at 335-36; *Rybachek*, 904 F.2d at 1285; *M.C.C.*, 772 F. 2d 1505-06. While Congress did include substances such as rock, sand, and dredged spoil in the definition of a "pollutant," 33 U.S.C. 1362(6), it does not necessarily or logically follow that their redeposit in the same place in the same form constitutes the "addition" of a pollutant. Rock, sand, dredged spoil, and other similar substances would without question be additions of pollutants if placed in new locations, even if within the same general area. For example, dumping truckloads of dirt and soil from excavated land into navigable waters would obviously constitute the addition of a pollutant. It defies all reason to label a redeposit of the same substance in the same place an "addition" just because the substance can in some instances also be a pollutant.

The D.C. Circuit has not followed the *Avoyelles* line of cases, holding instead with refreshing common sense that "we fail to see how there can be an addition of dredged material when there is no addition of material." *National Mining Association* v. *U.S. Army Corps of Engineers*, 145 F. 3d 1399, 1404 (D.C. Cir. 1998) (quoted in *Borden Ranch*, 261 F. 3d at 819 (Gould, J., dissenting)). The D.C. Circuit further explained that, while the Corps may have jurisdiction to regulate some redeposit of materials, the agency's rule that effectively enlarged its jurisdiction to cover any incidental fallback of dredged materials exceeded the Corps' statutory authority under the Act. *National Mining*, 145 F.3d at

1405. As the Court stated, the "straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." *Id.* at 1404 (D.C. Cir. 1998). In *Borden Ranch*, Judge Gould would have followed *National Mining*, noting that the petitioners' deep plowing may "transform" the land, changing its "hydrological nature," but that "Congress spoke in terms of discharge or addition of pollutants, not in terms of change of hydrological nature of the soil." *Borden Ranch*, 261 F.3d at 820 (Gould, J., dissenting).

The voices of reason sound from the D.C. Circuit and Judge Gould. Mr. Tsakopoulos did not add a pollutant to his soil merely by plowing it. He did not need to obtain a federal permit.

III. Plows Pulled By Tractors And Bulldozers Are Not Point Sources.

To fall within federal permitting authority, soil that is returned to its original place must not only be considered a pollutant, but it must also be added to navigable waters by a "point source." This is because, as noted above, a "discharge" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(16), (12). Congress defined a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. 1362(14).

The Ninth Circuit summarily dismissed the argument that a plow should not be considered a point source. Rather than focusing on the plow, the object that actually turned the soil, the court instead looked to the farm equipment that pulled the plows – tractors and bulldozers. The court's cursory analysis was that "courts have found that 'bulldozers and backhoes' can constitute 'point sources,' *Avoyelles*, 715 F.2d at 922." *Borden Ranch*, 261 F.3d at 815. Since "bulldozers and tractors were used to pull large metal prongs [plows] through the soil" the Ninth Circuit could "think of no reason why this combination would not satisfy the definition of a 'point source.' " *Id.*

The Ninth Circuit should have thought a little harder. A point source is a "discernable, confined, and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. 1362(14). The bulldozers and backhoes in the *Avoyelles* case did not pull plows; instead, the bulldozers first were outfitted with shearing blade attachments to remove all trees and vegetation and then were outfitted with rake blades to rake the trees into windrows. *Avoyelles*, 715 F.2d at 920-21. The backhoes were used to dig pits approximately 50 feet long and 6 feet deep. *Id.* at 921. Thus, in *Avoyelles*, the bulldozers and backhoes were used as point sources, i.e., conveyances from which pollutants were discharged.

In this case, however, tractors and bulldozers were not used as point sources. They pulled plows, from which pollutants could not be discharged, i.e., added, because the plows simply churned the land. The plows did not dig, cut, or move the land. The plows added no

substance and moved no substance from one place to another. Thus, the plows, bulldozers, and tractors cannot be point sources under the definition of point source in 33 U.S.C. 1362 (14) or under the holding of *Avoyelles*.

IV. Deep Plowing Is A Normal Farming Activity Exempt From Federal Authority Under The Clean Water Act.

Even if this Court were to conclude that deep plowing constitutes the discharge of a pollutant, the plowing would still be exempted from federal jurisdiction. The Clean Water Act exempts normal farming activity from federal permitting authority. The Act provides that "the discharge of dredged or fill material ... from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating ... is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title...." 33 U.S.C. 1344(f)(1)(A).

The Ninth Circuit nevertheless held that deep plowing did not qualify for this exemption because it fell within an exception to the normal farming activity exemption called the "recapture provision":

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose *bringing an area of the navigable waters into a use to which it was not previously subject*, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. 1344(f)(2) (emphasis added). The Ninth Circuit held that, by converting his ranchland and cropland into orchards and vineyards, Mr. Tsakopoulos was "bringing the land 'into a use to which it was not previously subject.'" *Borden Ranch*, 261 F.3d at 815.

The effect of the Ninth Circuit's holding is to narrow the farming exception by broadening its recapture provision and thereby to expand the jurisdiction of the federal agencies. This is contrary to not only to the plain language of the Act but also to its purposes. "The upland farming, forestry and normal development activity carried out primarily by individuals and as a part of family business or family farming activity need not bear the burden of an effort directed primarily at regulating the kinds of activities which interfere with the overall ecological integrity of the Nation's waters.... *Without question, they should not and cannot be regulated by the Federal Government.*" S. Rep. 95-370 at 10, 1977 U.S.C.C.A.N. at 4336 (emphasis added).

In determining that the farming exemption did not apply, the Ninth Circuit followed *United States* v. *Akers*, 785 F.2d 814 (9th Cir. 1986), another case holding the farming exception not applicable based on the recapture provision. Yet, in *Akers*, the farmer was not converting his land from one exempt use to another. The farmer was converting swampland to farmland, unquestionably bringing the land into a use to which it was not previously subject. In *Akers* the farmer had planned "extensive grading, leveling, drainage and water diversion" to convert the area known as "Big

Swamp" from wetlands into croplands. *Akers*, 785 F.2d at 816. The land in question had never been used for any traditional farmland operation. *Id.* at 819. In upholding the injunction prohibiting the farmer's planned conversion, the *Akers* court was careful to limit its holding to the facts before it and to reject the government's position that a change in cropland use required a federal permit. The court stated: "We do not believe that Congress intended to place the burden of Corps permit regulation on farmers who desire merely to change from one wetland crop to another." *Id.* at 820.

In this case, the land in question was ranchland and cropland before its conversion to orchards and vineyards. All of these are normal farming activities, exempted from federal permitting requirements by 33 U.S.C. 1344(f)(1)(A). Mr. Tsakopoulos's decision to change from one crop to another, or from ranchland and cropland to another exempted farming activity, does not bring the land "into a use to which it was not previously subject" for purposes of the Section 1344(f)(2) recapture provision. The land was used for normal farming and ranching activities and continues to be used as such after its crop rotation to orchards and vineyards. As Judge Gould opined, "[f]armers have been altering and transforming their crop land from the beginning of our nation, and indeed in colonial times. Although I have no doubt that Congress could have reached and regulated the farming activity challenged, that does not in itself show that Congress so exercised its power." *Borden Ranch*, 261 F.3d at 819 (Gould, J., dissenting).

The petitioners' activities are normal farming activities. The conversion from ranchland and cropland to another form of cropland, when all uses are exempt, does not constitute the transformation of land to a use to which it was not previously subject. Thus, the activities are exempt and do not fall within the recapture provision.

CONCLUSION

The ruling of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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BORDEN RANCH PARTNERSHIP; ANGELO K. TSAKOPOULOS,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On a Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the Petitioners. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 208,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Many of NAHB's members own and develop land. It is therefore concerned with any judicial decision that affects the regulation of land development.

NAHB submitted an *amicus* brief in this case urging the Court to grant *certiorari*.[2] The central issue concerns

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[1] Pursuant to Rule 37.6 of this Court, *amicus* states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

[2] NAHB has been before the Court as an *amicus curiae* or as "of counsel" representing the interests of property owners in a number of cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995);

the extent of activities over which the Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") can require federal approval through the permitting programs of the Clean Water Act ("CWA"). These are some of the most common permits that NAHB's members must obtain in their projects to provide housing for the Nation's citizens. *Amicus* submits that the Agencies often compel its members to apply for CWA permits beyond the scope of congressional authority. To curb such regulatory overreach, since 1991 NAHB has participated in numerous lawsuits—both as a named party and as an *amicus*—to police the CWA's permitting programs and attempt to stop the Agencies from extending their authority in an unauthorized manner.

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002).

INTRODUCTION

Congress passed the Clean Water Act in 1972 in response to concerns that industrial and municipal facilities were discharging untreated waste materials into the Nation's surface waters. To tackle that problem, the Clean Water Act established a permitting system to regulate the discharge of pollutants into navigable waters. Although the goals of the CWA are ambitious (to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters...."), Congress selected with care the means by which it would pursue those goals. 33 U.S.C. § 1251(a). It did not prohibit all actions that cause some type of environmental damage to an aquatic resource; it focused on *discharges* to navigable waters. The Ninth Circuit, however, has disregarded Congress's carefully chosen words, holding instead that Petitioner's "deep-plowing" to prepare his land for a vineyard must be regulated under Section 404 of the Clean Water Act because it causes "environmental damage." *Borden Ranch Partnership v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 815 n.2, 819 (9th Cir. 2001) (Judge Gould uses the term "deep-plowing" in his dissent).

The Court addressed a similar administrative disregard of congressional language in the same CWA program just two years ago. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001) ("*SWANCC*"), the Corps claimed that isolated, intrastate ponds located on a landfill in northern Illinois were "navigable waters" subject to section 404 permit requirements. The Court rejected this broad assertion of federal authority, observing that the term "navigable

waters" cannot be read out of the statute. *SWANCC,* 531 U.S. at 172.

While *SWANCC* addressed the *geographic* extent of CWA jurisdiction, the case at bench concerns the types of *actions* that the CWA regulates and the specific words Congress selected to specify those *actions*. *Amicus* NAHB will show that CWA jurisdiction is like Venn diagram circles contained within each other:

- First, when Congress enacted the CWA, its overriding goal was to *control water pollution.* (*Infra,* pp. 5-7.)

- Second, one means by which Congress sought to control water pollution was by establishing permit programs in Sections 402 and 404. These permit programs only regulate actions that "*discharge*" or "*add*" materials to navigable waters. (*Infra,* pp. 7-9.)

- Third, Section 404—the particular permit program at issue here—addresses a specific type of addition, the discharge of "*dredged or fill material.*" (*Infra,* pp. 9-11.)

- Fourth, Section 404's scope is further narrowed by the statutory language that directs discharges to *"specified disposal sites."* (*Infra,* pp. 11-13.)

The Ninth Circuit improperly ignored this statutory framework. It ruled that federal regulation was appropriate because Petitioner's plowing activity "constitutes environmental damage." *Borden Ranch Partnership,* 261 F.3d at 815 n.2. This ruling was wrong because Borden Ranch's plowing did not (1) discharge or

add (2) dredged or fill material at a (3) specified disposal site.[3]

In the end, the Ninth Circuit's decision was wrong because it disregards the boundaries of the CWA's effective, coercive—but limited—regime.

ARGUMENT

I. TO MEET THE CLEAN WATER ACT'S GOAL OF CONTROLLING WATER POLLUTION, CONGRESS SPECIFIED THAT FEDERAL AGENCIES CAN ONLY REGULATE "DISCHARGES" THAT "ADD" POLLUTANTS.

A. Congress's Goal: Control Water Pollution.

Waterways burned in the years leading up to the CWA's enactment. "In 1969, the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire. Congress responded to that dramatic event, and to others like it, by enacting the [CWA]." *SWANCC,* 531 U.S. at 174-75 (Stevens, J., dissenting); *see United States v. Ashland Oil and Transportation*, 504 F.2d 1317, 1325 (6th Cir. 1974) (fires on the Schuylkill, Cuyahoga, and Rouge rivers threatened navigation; when it enacted the CWA, "Congress was convinced that uncontrolled

[3] Indeed, the Agencies' approach in Borden Ranch is not unique. Recent Corps and EPA regulations unlawfully extend CWA authority over a vast spectrum of soil movements (not just plowing) merely because those movements affect aquatic resources. Through a regulation issued in January 2001, the Agencies "regard" any "earth-moving activity" caused by a machine as a statutory "discharge" that requires a Section 404 permit—regardless of whether any pollutant is actually *added* when soil is moved. *See* 66 Fed. Reg. 4550, 4575 (2001) (codified at 33 C.F.R. § 323.2 (2001)). (*See infra* pp. 24-26.)

pollution of the nation's waterways is a threat to the health and welfare of the country, as well as a threat to interstate commerce.").

Congress responded to the threats posed by untreated discharges of pollutants into the Nation's surface waters by enacting the Federal Water Pollution Control Amendments of 1972, otherwise known as the CWA, 33 U.S.C. §§ 1251-1387. The CWA's first stated goal is to eliminate "the discharge of pollutants into the navigable waters...." 33 U.S.C. § 1251(a). The CWA also contains myriad programs evidencing Congress's overriding goal to reduce water pollution. [4]

The CWA contains targeted programs to deal with pollution in specific navigable waters of national significance. *See 33 U.S.C.* §§ 1258, 1268 (Great Lakes); *id.* § 1266 (Hudson River); *id.* § 1267 (Chesapeake Bay); *id.* § 1269 (Long Island Sound); *id.* § 1273 (Lake Pontchartrain); *id.* § 1330 (estuaries). The CWA also targets specific types of water pollutants. *See, e.g., id.* § 1257 (mine water pollution); *id.* § 1265 (toxic pollutants); *id.* § 1321 (oil pollution); *id.* § 1345 (sewage sludge).

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[4] *See, e.g.*, 33 U.S.C. §§ 1254-1256 (research and grant programs to study water pollution); *id.* §§ 1281-1301 (federal grant programs for construction of publicly-owned works to pre-treat wastewater entering receiving waters); *id.* §§ 1311-1314 (program regarding effluent limitations from point sources to achieve water quality standards developed by States); *id.* § 1313(d)(1)(C) (requiring States to establish "total maximum daily loads" for certain pollutants, or the maximum permissible level of pollutants allowed in designated impaired waters); *id.* § 1316 (EPA to establish national standards of performance for various industrial sources to develop technologies necessary to control discharge of pollutants); *id.* §§ 1381-1387 (revolving fund program for States to construct treatment works and implement water management programs).

As the primary means to achieve the CWA's goal to limit and ultimately eliminate water pollution, Section 301(a) imposes a blanket prohibition on the "discharge of any pollutant by any person"—unless permitted elsewhere in the Act. *Id.* § 1311(a), 1362(6) and (12); *see International Paper Company v. Ouellette*, 479 U.S. 481, 489 (1987) ("One of the primary features of the [CWA is] a federal permit program designed to regulate the discharge of polluting effluents."); *Rueth v. U.S. E.P.A.*, 13 F.3d 227, 229 (7th Cir. 1993) ("To achieve the purposes of the Act, Congress prohibited the discharge of any pollutants, including dredged or other fill material, except in accordance with the Act.").

Section 404 is one exception to the discharge prohibition. It authorizes the Corps to issue permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Section 402 is another exception to the discharge prohibition. It authorizes EPA and delegated States to issue permits for discharges of other pollutants, such as industrial and municipal waste. *Id.* §§ 1342, 1362(6).

B. Clean Water Act Framework: Regulate "Discharges" that "Add" Pollutants.

The existence of a "discharge" is the critical, deciding factor in determining whether CWA jurisdiction is triggered and therefore whether a Section 402 or 404 permit is required. Congress defined the term "discharge" to mean an "addition" of a pollutant to navigable waters. 33 U.S.C. § 1362(12). Thus, the CWA regulates only those actions that *add* pollutants to navigable waters. Actions that impact waters but add no pollutants are beyond CWA jurisdiction. *See Save Our Community v.*

U.S.E.P.A., 971 F.2d 1155, 1162-63 (5th Cir. 1992) (absent a discharge, the destruction of a wetland is not regulated by the CWA). Conversely, a discharge that adds pollutants is regulated even if no damaging effects result. *See Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 626-27 (8th Cir. 1979) (discharges are regulated even where water quality is not affected).

The D.C. Circuit has observed the distinction between the CWA regulation of "discharges" and the regulation under a separate statutory scheme of other actions that can adversely affect navigable waters:

> [T]he removal of material from the waters of the United States, as opposed to the discharge of material into those waters, is governed by a completely independent statutory scheme. ... the [Rivers and Harbors Act of 1899] covers the act of dredging, while [CWA] Section 404 [] covers the disposal of the dredged material.

National Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1404 (D.C. Cir. 1998) (citations omitted).

In sum, Congress did not intend the CWA to be an *über*-environmental statute to regulate any activity that could cause aquatic degradation. The Act's scope is narrower: to limit water pollution by regulating actions that "discharge" or "add" pollutants. *See National Mining*, 145 F.3d at 1410.

One reason Borden Ranch's activities fall outside CWA jurisdiction is because the plowing at issue did not "discharge" or "add" a pollutant. Soils may have been

moved around the tines of the plow and earth may have been displaced, but nothing new was added to a navigable water.[5]

II. SECTION 404 IS A LIMITED REGULATORY SUBSET OF THE CLEAN WATER ACT THAT APPLIES ONLY TO DISCHARGES OF "DREDGED OR FILL MATERIAL" INTO NAVIGABLE WATERS AT "SPECIFIED DISPOSAL SITES."

A. Section 404 Applies Only To Additions of "Dredged or Fill Material."

Congress established the Section 404 regulatory program to address one particular type of polluting activity—the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The Corps relies on Section 404 to assert regulatory authority over and require permits for "the discharge of dredged or fill material into waters of the United States." *See* 33 C.F.R. §§ 323.1, 323.3(a). By its terms, Section 404 and the Corps' implementing

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[5] After *SWANCC*, it is questionable whether Petitioner's land qualifies as "navigable waters" under the CWA. In fact, the scope of CWA geographic jurisdiction after *SWANCC* is the subject of a split in the Circuits. *Compare Rice v. Harken Exploration Co.*, 251 F.3d 264, 269 (5th Cir. 2001), *with Headwaters v. Talent Irrigation Co.*, 243 F.3d 526, 533 (9th Cir. 2001). Nonetheless, geographic jurisdiction has not been raised as an issue in this case because the parties have agreed to assume for purposes of this litigation that the land in question is "navigable waters." To the extent the Court adopts this assumption, *Amicus* respectfully urges the Court to make clear that the issue of geographic jurisdiction is not before it and it is not *holding* that this land is jurisdictional.

regulations apply only to discharges of "dredged or fill material" "into" navigable waters.

Thus, whether an action is subject to Section 404 regulation turns on whether "dredged or fill material" is discharged. (The discharge of fill material is not at issue in this case.[6]) "Dredged material" is not defined in the CWA, but Corps regulations define it as "material that is excavated or dredged *from* waters of the United States." *Id.* at § 323.2(c) (emphasis added). Thus, material must actually be dredged from waters to qualify as "dredged material." This stands to reason. The ordinary meaning of "dredge" is

> *v.* **1** *tr.* **a** (often foll. by *up*) bring up (lost or hidden material) as if with a dredge (*don't dredge all that up again*). **b** (often foll. by *away*, *up*, *out*) bring up or clear (mud, etc.) from a river, harbor, etc. with a dredge. **2** *tr.* clean (a harbor, river, etc.) with a dredge…

Oxford American Dictionary, 291 (Oxford University Press 1999). "Dredge" essentially means to bring material

[6] "Fill material" is material "*placed in* waters of the United States where the material has the effect of … [r]eplacing an aquatic area with dry land" or "[c]hanging the bottom elevation of a water of the United States." 33 C.F.R. § 323.2(e) (July 1, 2002) (emphasis added). The regulatory definition of "discharge of fill material" specifically excludes

> plowing, cultivating, seeding and harvesting for the production of food, fiber and forest products.

Id. at § 323.2(f). Material was not "placed in" waters of the United States by petitioner's activities, and, in any event, petitioner's activities did involve plowing for the production of food products.

up and clear it away from a waterbody (to allow, for example, the movement of vessels in interstate commerce). It follows, as the Corps' regulations apparently recognize, that "dredged material" is material that is actually removed *from* a waterbody, not soil that is merely churned but remains in a waterbody. 33 C.F.R. § 323.2(c). Only material dredged *from* water is "dredged material," and only when that material is subsequently discharged "into" navigable waters is Section 404 triggered. 33 U.S.C. § 1344.[7]

Another reason Borden Ranch's activities fall outside CWA jurisdiction is because the plowing at issue did not dredge material up from a waterbody. The plow may have moved soils around, but it did not dredge material from a waterbody.

B. Section 404's Direction that the Corps Only Permit Discharges at "Specified Disposal Sites" Shows that a Discharge is a Discrete Activity Separate from Dredging.

Section 404 authorizes the Corps to issue permits for the discharge of dredged or fill material into navigable waters "at specified disposal sites." 33 U.S.C. § 1344(a). Congress's use of the term "specified disposal sites" is consistent with the common dredging practice of

[7] Likewise, in the context of Section 404, the Court of Appeals for the Second Circuit has observed that merely recirculating material within a waterbody is not an "addition" triggering a permit requirement. Discussing *National Wildlife Federation v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988), the court noted that a permit was not required because "[t]he navigable water was recirculated, but nothing was added." *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 491 (2nd Cir. 2001).

excavating material *from* one place and dumping it *into* another area—*viz.*, the "specified disposal site."[8] The term "specified disposal site" evidences that Section 404 governs material that is removed and taken away to be discarded (i.e., "disposed"), and ultimately placed at some different point away from the locale of initial dredging (i.e., "specified site."). Thus, by its plain terms, Section 404 envisions and applies to a discharge that adds dredged or fill material at a site specified for "disposal."

Another reason Borden Ranch's activities fall outside the scope of the CWA is that its plow did not dispose of soil and, thus, there was no "disposal site" that could be specified in a Section 404 permit. The plow may have churned soil and moved it around, but it did not take away dirt from a dredging site and dispose of it at a specific location elsewhere. Under the Ninth Circuit's reasoning, any area subject to plowing would be both a dredging site and a specified disposal site, but the statute clearly contemplates that dredging and disposal of dredged

[8] The legislative history indicates that Congress understood "discharge of dredged material" to mean the disposal in one area of material dredged from another area, i.e, dredging and the subsequent disposal of dredged material are two distinct operations. In his remarks during the floor debate, Sen. Muskie stated "There is no question that [the Corps] should retain authority to permit dredging operations . . . But, conversely, spoil disposal should be subject to EPA regulations . . .." 117 Cong. Rec 38797, 38854 (1971); *see also id.* at 38853-54 (colloquy among Senators Ellender, Muskie, and Stennis) (discussing disposal of dredged material in open water, which is "essential since the Secretary of the Army is responsible for maintaining and improving the navigable waters of the United States") and 118 Cong. Rec. 33692, 33699 (1972) (Senate Consideration of Conference Report on S. 2770) (EPA "should have the veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.").

material are separate acts that occur in separate places at separate times. This Congressional language must be given effect. *See SWANCC*, 531 U.S. at 171-72 (unlawful to read terms out of the CWA). Congress could not have intended the tortured reading of the statute the Ninth Circuit would render.

III. THE NINTH CIRCUIT SHOULD BE REVERSED BECAUSE IT UPHELD FEDERAL REGULATION BASED ON A BROAD "ENVIRONMENTAL EFFECTS" TEST, IGNORING THE LIMITED SCOPE AND SPECIFIC TEXT OF THE CLEAN WATER ACT AND SECTION 404 ITSELF.

A. The Ninth Circuit was Wrong.

Again, only (1) "discharges" that "add" (2) "dredged or fill material" at (3) "specified disposal sites" within navigable waters require a Section 404 permit. *See* 33 U.S.C. § 1344(a). Because Petitioner's plowing activity did not meet these requirements, it did not need a Section 404 permit.

Yet the Ninth Circuit upheld the assertion of federal jurisdiction because Borden Ranch's soil movements, in its view, caused environmental harm. Offended by Petitioner's "deep ripping," a form of plowing used to prepare soil for the deep roots of orchards and vineyards, the Ninth Circuit held that "activities that destroy the ecology of a wetland are not immune from [CWA] jurisdiction merely because they do not involve the introduction of material brought in from somewhere else … [Petitioner's activity] constitutes environmental damage

sufficient to constitute a regulable redeposit." *Borden Ranch Partnership*, 261 F.3d at 814-15 n.2.

This conclusion was erroneous and warrants reversal. Environmental damage *per se* cannot be the basis for CWA jurisdiction. The specific textual elements discussed above are prerequisites for Section 404 jurisdiction, and they have not been satisfied in the case at bench.

B. The Other Circuits are Consistent: Only Additions of Material Trigger CWA Jurisdiction.

By concluding that jurisdiction is triggered by "damage" rather than a "discharge," the Ninth Circuit departed from consistent holdings of other circuits. In *National Mining*, the D.C. Circuit vacated a rule that attempted to regulate land-clearing and other excavation activities by characterizing the soil movements accompanying such activities as a "discharge of dredged material." The Agencies argued that soil becomes a pollutant once it is excavated, and that the soil material that inevitably falls off a shovel during such excavation is therefore a discharge of a pollutant. There was no question that the Agencies' purpose in adopting the rule was to reach activities that altered or destroyed wetlands. But the D.C. Circuit held that there can be no "addition" of a pollutant without an addition of material.

> [T]he straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge.

National Mining, 145 F.3d at 1404 (citations omitted).

The Fifth Circuit has likewise held that a discharge into navigable water, not effects, is the jurisdictional prerequisite for regulation under Section 404. In *Save Our Community*, a landfill operator proposed to drain several man-made ponds within the site to make them suitable for landfill use. The Corps and EPA agreed that the operator's draining activities were not regulated because they did not result in an addition of dredged or fill material. The district court held that the proposed activity would destroy wetlands and therefore required a permit. The Fifth Circuit reversed, holding that "absent a finding of discharge, draining activity that converts a wetland does not trigger section 404 jurisdiction . . .." *Save Our Community*, 971 F.2d at 1165-66.[9]

The Ninth Circuit relied on two prior decisions to find that Petitioner's deep ripping qualified as a "discharge." Both of the prior decisions, however, addressed material that was first "dredged" or "excavated" *from* water, then subsequently discharged *into* navigable water. *Rybachek*

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[9] The Eighth Circuit, addressing the same issue from the opposite perspective, has also held that a discharge, not effects, is the deciding factor in triggering CWA jurisdiction. In *Minnehaha Creek Watershed Dist. v. Hoffman*, the lower court held that the construction of dams and placement of riprap into lake waters did not constitute a discharge because there was no evidence that the activities would have detrimental effects. But the Eighth Circuit held that, if a discharge occurs, it will still be regulated regardless of whether the activity involves a "significant alteration in water quality." 597 F.2d 617, 626-27.

v. U.S. E.P.A., 904 F.2d 1276, 1285 (9th Cir. 1990) (where streambed is excavated, then processed to extract gold, subsequent discharge of sifted material into navigable water is regulable); *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000) ("the contractor removed earth and vegetable matter *from* the wetland… once that material was *excavated from* the wetland, its redeposit in that same wetland added a pollutant…") (emphasis added).

In clear contrast to *Rybachek* and *Deaton*, Borden Ranch moved material within waters but did not dredge material *from* a water and subsequently "discharge" it "*into*" a navigable water. The D.C. Circuit recognized this distinction in *National Mining*. 145 F.3d at 1406 ("*Rybachek* would help the agencies if [it held that fallback during placer mining constituted a discharge], but instead it identified the regulable discharge as the discrete act of dumping leftover material into the stream *after* it had been processed.") (emphasis added). The Second Circuit likewise has emphasized that mere recirculation is not an addition:

> If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle). In requiring a permit for such a "discharge," the EPA might as easily require a permit for Niagra Falls.

Catskill Mountains, 273 F.3d at 492.

The Ninth Circuit, however, wrongly excised the jurisdictional trigger of a "discharge of dredged or fill

material *into* the navigable waters" and rewrote Section 404 to regulate soil movements that cause "damage." 33 U.S.C. § 1344(a) (emphasis added).

IV. CURRENT SECTION 404 REGULATIONS ENFORCED BY THE CORPS AND EPA ARE ILLEGAL BECAUSE THEY COVER GENERIC "EARTH-MOVING" ACTIVITIES, REGARDLESS OF WHETHER THOSE ACTIVITIES "DISCHARGE" OR "ADD" ANYTHING TO NAVIGABLE WATERS.

The Ninth Circuit's "environmental effects" test for CWA jurisdiction will only fuel the recent growth of the Section 404 regulatory state. Since 1991 the Corps and EPA have issued three separate regulations and innumerable bits of "guidance," all in an effort to redefine "discharge of dredged material" to capture more and more activities. In so doing, the Agencies have alchemized "discharge" to cover sweeping categories of activities that cannot remotely be construed to "add" anything to jurisdictional waters. Even if the subject activity *removes* or *excavates* material, the Corps and EPA nonetheless require a Section 404 permit through its current regulations.

The timeline below lays bare the Agencies' extra-jurisdictional attempts to regulate based on environmental effects. It chronicles the "pull" of the courts to give the effect to the term "discharge" and the Agencies' reactive, expansive "push" to cover virtually any action that subtracts soil from, or moves soil around in, a navigable water. Such regulatory overreach will continue unabated unless the Court overrules the Ninth Circuit and sends

strong cautionary words about the limits of CWA jurisdiction.

A. 1972-1990: Early Regulations Were Faithful to the CWA.

During the first 18 years that the Corps and EPA enforced the CWA, they faithfully interpreted Section 404 in a manner confirming that "discharge" required an addition of materials. In 1977, the Corps promulgated final regulations defining the term "discharge of dredged material" as "any addition of dredged material into waters of the United States." 42 Fed. Reg. 37,122, 37,145 (1977). Guidance issued in 1981 and reissued in 1984 reinforced the understanding that additions were regulated, but removals and other soil movements were not:

> [Section 404] does not authorize the Corps to regulate dredging in [waters of the United States] .... *De minimus* discharge occurring during normal dredging operations, such as the drippings from a dragline bucket, is not considered to be a Section 404 discharge.[10]

In 1986 the Agencies issued revised Section 404 regulations that remained consistent with the idea that activities involving incidental soil movement were not regulated. *See* 33 C.F.R. § 323.2(d) (1992) (Corps regulations); 40 C.F.R. § 232.2(e) (1992) (EPA regulations). In the preamble to its 1986 regulations, the

[10] U.S. Army Corps of Engineers, Regulatory Guidance Letter 81-4: Application of Section 404 to Dredging Projects ¶¶ 1-2 (June 3, 1981); U.S. Army Corps of Engineers, Regulatory Guidance Letter 84-4: Application of Section 404 to Dredging Projects ¶¶ 2-3 (Mar. 23, 1984) (reissuance of RGL 81-4).

Corps plainly acknowledged: "We have consistently provided guidance to our field offices since 1977 that incidental fallback is not an activity regulated under section 404." 51 Fed. Reg. 41,206, 41,210 (1986).

B. 1991: Tulloch Rule 1 Purports to Regulate "Incidental Fallback."

The regulatory landscape shifted in 1991, when environmental groups sued the Agencies and two landowners, alleging that the landowners' clearing and excavation activities destroyed and degraded wetlands and therefore should be subject to Section 404 regulation. *North Carolina Wildlife Fed'n v. Tulloch,* No. C90-713-CIV-5-BO (E.D.N.C. 1992). Rather than defend the lawsuit, the Corps and EPA settled by agreeing to amend their rules to regulate landclearing and excavation. On August 25, 1993, the agencies adopted a final rule—commonly known as the Tulloch Rule (hereafter "Tulloch 1")—that was virtually identical to the language dictated by the parties' settlement agreement. *See* 58 Fed. Reg. 45,008 (1993).

Tulloch 1 purported to extend the Agencies' authority to a new category of activity known as "incidental fallback": "any redeposit of dredged material . . . which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 58 Fed. Reg. at 45,035, 45,037. Because it is "virtually impossible" to excavate or clear land without causing some incidental soil movement (*see id.* at 45,017), and because such incidental soil movement was now considered a "discharge," *for the first time since the CWA's inception,* Tulloch 1 required a Section 404 permit for all actions that removed soils from, or pushed soils in,

jurisdictional waters. The Agencies acknowledged that their decision to now regulate incidental fallback was not driven by concern about the incidental soil movement itself, but rather by concern about adverse effects resulting from the underlying excavation activities. *See* 58 Fed. Reg. at 45,019. Characterizing incidental soil movement as a "discharge" thus provided the pretext for regulating removal, ditching, plowing, and other soil-moving activities that the Agencies had no authority to regulate directly under the Act.

C. 1997-1998: Federal Courts in the D.C. Circuit Strike Tulloch 1 As Facially Invalid Because the Rule Regulated Activities that Did Not Add Materials.

In 1993, *Amicus* NAHB and other trade groups challenged Tulloch 1 as exceeding the Corps' and EPA's authority. The U.S. District Court for the District of Columbia agreed with NAHB. Recognizing that Section 404 regulates only "discharges" (and not removal or soil disturbance *per se*), the district court found Tulloch 1 "inconsistent with the language and intent of the [CWA]." *American Mining Congress v. U.S. Army Corps of Eng'rs,* 951 F.Supp. 267, 270 (D.D.C. 1997). "[Congressional] understanding of 'discharge' excludes the small-volume incidental discharge that accompanies excavation and landclearing activities." *Id.* at 273. Accordingly, the district court "declared [Tulloch 1] invalid" and entered a permanent injunction ordering the agencies "not to appl[y] or enforc[e]" the rule. *Id.* at 278.

The U.S. Court of Appeals for the D.C. Circuit affirmed without dissent in *National Mining.* The appeals court examined the administrative record and concluded

that Tulloch 1 stretched federal authority to reach, among other things, the "soils and sediments [that] fall from the bucket" during excavation operations, and the "scrap[ing] or displac[ement of] wetland soil" during mechanized landclearing." *National Mining*, 145 F.3d at 1403 (citing Tulloch 1 preamble, 58 Fed. Reg. at 45,017-018). However, such an extension of authority flouted Congress's definition of "discharge" because it did not require some "addition" of material. *Id.* at 1404. Simply, "how [can there] be an addition of dredged material when there is no addition of material"? *Id.*

D. 1997-1999: Corps and EPA Efforts to Circumvent the *AMC* and *National Mining* Opinions and Regulate Excavation and Other Soil Movements *Per Se.*

The Corps and EPA responded with a campaign of resistance to *AMC* and *National Mining.* An EPA official derided these decisions as creating a "loophole" in the statute. Memorandum from J. Charles Fox, Assistant Administrator for Water, to The Administrator, "Impacts to Public Health and the Environment Associated with the 'Tulloch' Decision—ACTION MEMORANDUM" (June 1, 1999). The Corps also issued a document styled as "'Interim, Interim' Information Regarding the 'Excavation Rule' Decision, *American Mining Congress v. Corps*" (February 13, 1997)). The "Interim, Interim Information" instructed Corps field officials that they could properly assert jurisdiction over incidental fallback, notwithstanding the result in *AMC*, by bootstrapping authority over some other part of a larger project where a regulable addition of material had in fact occurred. The "Interim, Interim Information" directed that "many projects that could be built with only 'incidental fallback,' . . . also need Corps

authorization for access roads or other parts of the project … [T]he excavation [*i.e.*, non-regulated] part of the project can be treated as secondary impacts of the parts of the overall project that we do regulate."

Next came "Tulloch 2," an "interim" rule published on May 10, 1999, pending a formal rulemaking to comply with *National Mining*. *See* 64 Fed. Reg. 25,120 (1999). Although styled as an attempt to comply with the *AMC* and *National Mining* decisions, Tulloch 2 was nothing more than a resuscitation of the rejected Tulloch Rule 1. Based on the plain text of Tulloch 2,[11] the agencies continued to unlawfully regulate soil ("excavated material") inevitably displaced as an "incidental" byproduct of landclearing or "other [mechanized] excavation." Because virtually all mechanized operations in jurisdictional waters move around grains of soil, Tulloch 2 regulated a vast array of activities regardless of whether material was actually added to the waterbody.[12]

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[11] The May 10, 1999, rule changed the language of Tulloch 1 as follows: "Any addition of dredged material into, including redeposit of dredged material other than incidental fallback, within, the waters of the United States. The term includes, but is not limited to the following:*** any addition, including any redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing . . . or other excavation." 64 Fed. Reg. at 25,123.

[12] The preamble to Tulloch 2 offered a predictably cramped explanation of the minimalist changes made from Tulloch 1. In the Tulloch 2 preamble the Agencies stated that *National Mining* invalidated Tulloch 1 *only* because it impermissibly regulated incidental fallback. 64 Fed. Reg. at 25,120. While leaving to another day the question of what types of redeposits might constitute incidental fallback, in one portion of the Tulloch 2 preamble the Corps and EPA declared categorically that soil movements associated with "mechanized landclearing" are automatically "redeposits…subject to CWA jurisdiction…" *Id.* at 25,121.

E. 2000: The *AMC* Court Cautions the Agencies Against Taking an "Unduly Narrow" Interpretation of Non-Regulated Activities.

After Tulloch 2's issuance NAHB returned to the D.C. District Court, arguing that the interim rule violated the court's injunction that forbade the Agencies to apply or enforce Tulloch 1. The district court ruled that Tulloch 2 did not violate the injunction because it was only an interim step. However, the court also criticized the Agencies' cramped interpretation of incidental fallback, stating that it did "not comport with the Court's understanding . . .." *American Mining Congress v. U.S. Army Corps of Eng'rs,* No. CIV.A. 93-1754, 2000 U.S. Dist. LEXIS 13953 at **24 (D.D.C. Sept. 13, 2000) (hereafter "*AMC II*"). The district court further "caution[ed] [the Agencies] against parsing the language of the decisions in *[National Mining]* and *AMC* to render a narrow definition of incidental fallback that is inconsistent with an objective and good faith reading of those decisions." *AMC II,* 2000 U.S. Dist. LEXIS 13953, at **25. To "ensure" that the Agencies did not take an "unduly narrow definition" of "incidental fallback," the district court emphasized that the Agencies have authority to regulate only some forms of soil redeposits—namely, those that add materials to navigable waters. *Id* at **23, **25. In this regard, the district court emphasized the following language from *National Mining:*

> But [Tulloch 1] makes no effort to draw … a line [between regulated and non-regulated redeposits], and indeed its overriding purpose appears to be to expand the Corps' permitting authority to encompass . . . a wide range of activities that cannot remotely be said to "add" anything to the waters of the United States.

AMC II, 2000 U.S. Dist. LEXIS 13953, at **17.

F. 2001: The Agencies Issue Tulloch 3 and "Regard" Vast Categories of Soil Moving Activities as Regulated "Discharge."

The D.C. District Court did not strike Tulloch 2, in large measure, because it was an interim rule that would be followed by "a notice and comment rulemaking 'to make a reasoned attempt to more clearly delineate the scope of CWA jurisdiction over redeposits of dredged material.'" *AMC II,* 2000 U.S. Dist LEXIS 13593 at, **19-**20 (citing Tulloch 2, 64 Fed. Reg. at 25,121). That new rule—"Tulloch 3"—is in effect today and governs the Agencies' present regulatory regime. Tulloch 3 is another revision of the term "discharge of dredged material." *See* 66 Fed. Reg. 4550 (2001). It suffers from the same defect as its predecessors because it regulates all earth-moving activities (e.g., land-clearing, ditching) simply because they move soils, not because they cause *discharges* that *add* pollutants.

Tulloch 3 declares that, despite whether any addition of material actually occurs, the Corps and EPA "regard" all landclearing and other "earth-moving activity" in navigable waters "as resulting in a discharge of dredged

material"—unless the regulated entity convinces the Agencies with "project specific evidence" that the activity results in "only incidental fallback." 66 Fed. Reg. at 4575. Through Tulloch 3, the Agencies have effectively presumed that any earth-moving activity is regulated as a CWA discharge.[13] Whether the activity is plowing or excavation, Tulloch 3 is a sweeping assertion of federal jurisdiction over activities that do not add materials to waters of the United States. As a result, Tulloch 3 is currently the target of yet another court challenge filed by *Amicus. See National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, No. 1:01CV00274 (D.D.C. filed Feb. 6, 2001) (consolidated with 1:01CV00320). That litigation has been stayed by the parties pending a decision from the Court in the case at bench.

With all of their regulatory machinations over the past nine years, the Agencies' motivation has become apparent. What they *really* want is to regulate any activity that has an adverse effect on any water anywhere. However, the language of the CWA—specifically the term "discharge of dredged material at specified disposal sites"—limits what they may regulate. As the courts in the D.C. Circuit and Judge Gould's dissent below have observed, if the Agencies are not satisfied with the CWA as it now stands,

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[13] When the agencies initially proposed Tulloch 3, they sought to establish a rebuttable presumption that all mechanized earth-moving activities resulted in a regulable discharge. 65 Fed. Reg. 50,108 (Aug. 16, 2000). The final version of Tulloch 3 dropped the "presumption" language in favor of language that "regard[s]" earth-moving activities in waters of the United States as regulated. Tulloch 3, 66 Fed. Reg. at 4575 (Jan. 17, 2001). Word choice aside, the impact on the regulated community is the same: the Agencies presume that all mechanized movement of soil in a navigable water will require a Section 404 permit.

they should go to Congress to amend the CWA for language that suits their broader agenda. *See Borden Ranch Partnership*, 261 F.3d at 821 (Judge Gould dissenting).

CONCLUSION

For all of the foregoing reasons, the Ninth Circuit's decision should be reversed.

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In the

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS, Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF SAVE OUR SHORELINE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus curiae will address the following question:

Whether deep plowing ranchland to plant deep-rooted crops constitutes the "addition" of a "pollutant" (the plowed soil) from a "point source" (the plow) so as to fall within the regulation of Section 404 of the Clean Water Act?

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Amicus curiae submits this brief supporting petitioners;[1] both parties have consented to its filing. *See* Rule 37.3.

INTEREST OF AMICUS CURIAE

Amicus Curiae, Save Our Shoreline, Inc. ("SOS"), is a Michigan non-profit membership corporation, comprised of over 1,300 Saginaw Bay residents who own a house or live along the shoreline of Lake Huron. SOS's members have a direct and substantial interest in this Court's decision regarding the U.S. Army Corps of Engineer's ("Corps") authority to regulate "incidental fallback" and other historically lawful activities under Section 404 of the Clean Water Act. Members of SOS engage in routine beach maintenance activities to maintain clean and safe beaches.

Members have historically used a variety of hand tools such as rakes, shovels, and hoes as well as horse-drawn implements and mechanized equipment such as small tractors or golf carts to gather debris, smooth sand, and to eliminate mosquito-infested, stagnant water and nuisance vegetation. This normal beach maintenance results in incidental fallback on the shoreline of their properties and not in the waters of Lake Huron. Nevertheless, the Corps contends that shoreline

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[1] No counsel for either party authored this brief amicus curiae, either in whole or in part. Furthermore, no persons other than amicus curiae contributed financially to the preparation of this brief.

property owners' beach maintenance activities are unlawful without a Section 404 permit.

For over a century, the residents in Saginaw Bay have enjoyed unfettered maintenance of their beachfronts. Then in 1988, a dramatic change to the Saginaw Bay began due to the introduction of non-native zebra mussels. These rapidly multiplying mussels profoundly changed the ecology of Saginaw Bay, causing rapid plant growth and increased biological activity and decaying organic matter which ultimately gathers along the shoreline. Zebra mussels and substantial sewage and increased phosphate run-off into the Saginaw Bay have caused significant growth of vegetation near the shoreline and on the beaches themselves. Zebra mussels in high density also enhance the solubilization of phosphorus that causes noxious blue-green algae. *See* William F. James et al., *Enhanced Phosphorous Recycling by Zebra Mussels at High Density Levels in Relation to Food Supply* (Water Quality Technical Notes Collection, U.S. Army Engineer Research & Development Center (ERDC WQTN PD-09)) (May 2001), *available in* (visited August 21, 2002) <http://www.wes.army.mil/el/elpubs/wqtncont.html>. As the ultimate insult, zebra mussels die, leaving behind many thousands of sharp-edged, dead shells on the beaches.

Thus, the SOS homeowners, who for over a century have enjoyed and maintained beautiful sugar sand beaches, now own what the Corps calls "wetland." The Corps has launched an enforcement initiative against these SOS beachfront owners, and has filed three enforcement actions against individual homeowners, demanding that they cease and desist from all normal, routine beach maintenance. *See United States v. Stuart*, No. 02-10054 (E.D. Mich. Feb. 27, 2002); *United States v. Groya*, No. 02-10079 (E.D. Mich. Mar. 25, 2002); *United States v. Kincaid*, No. 02-10149 (E.D. Mich. May 28, 2002). How this Court defines the reach of the Clean Water Act may well determine the fate of the Saginaw Bay's public and private beaches and whether their historical beauty may be restored and maintained or whether they will be forced to stay overgrown with noxious weeds and other vegetation and covered with accumulated trash, debris and other organic matter (that breeds pests and rodents, often carrying diseases).

STATEMENT OF THE CASE

1. This case involves the right of Petitioners, Borden Ranch Partnership, and the title owner of Borden Ranch, Angelo Tsakopoulos, a farmer, rancher, and real estate developer, to "deeply plow" a privately owned 8,400 acre ranch near Lodi, California. Petitioners' Appendix ("Pet.

App.") 2-3. Portions of that ranch are classified as wetland by the Corps. *Id.* In this case, petitioner, Mr. Tsakopoulos, sought to convert his cattle ranch and crop land into vineyards and orchards; these proposed uses are consistent with the agricultural zoning of the property. *Id.* Since vineyards require deep roots, Mr. Tsakopoulos commenced deep plowing, which uses long metal prongs to penetrate several layers of soil. *Id.*

Mr. Tsakopoulos began deep plowing in the fall of 1993, and was granted an after-the-fact permit in the spring of 1994 after he was informed that he needed a wetland permit under Section 404 of the Clean Water Act to plow certain areas of his ranch. Pet App. 3; *see also* Pet. App. 72, 74, 77-78; *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810, 812 (9th Cir. 2001). He also agreed to mitigate for the wetland that he had disturbed without a permit. Pet. App. 3; *see also Borden Ranch*, 261 F.3d at 812.

In the spring of 1995, respondents issued Mr. Tsakopoulos a cease and desist order because he had engaged in deep plowing in wetland without a permit. Pet. App. 3; *see also Borden Ranch*, 261 F.3d at 813. Thereafter, from July to November 1995, in order to avoid further deep plowing, he plowed with the shank raised as high as possible, as

authorized by the Corps. Pet. App. 3. Respondents, nevertheless, later contended that this plowing was also deep plowing, and respondents issued another cease and desist order to Mr. Tsakopoulos in November of 1995. *Id.*; *see also Borden Ranch*, 261 F.3d at 813. In May of 1996, Mr. Tsakopoulos attempted to settle the matter with the Corps by dedicating a 1418-acre seasonal wetlands preserve (with 1368 contiguous acres) in the heart of the Borden Ranch to be managed by the Corps in perpetuity. Pet. App. 3-4; *see also Borden Ranch*, 261 F.3d at 813.

The Corps and EPA officials provided guidance for 1996 plowing on Borden Ranch in September of 1996, reconfirming that Mr. Tsakopoulos, without a permit, could deep plow uplands and cross the narrow, dry and widely dispersed drainages with the plow shank raised at its highest point. Pet. App. 3-4. Then, in April 1997, the EPA, ignoring the guidance given in September of 1996, issued Mr. Tsakopoulos yet another cease and desist order, requiring him to stop all activity involving "machinery crossing drainages" on the ranch. Pet. App. 4; *see also Borden Ranch*, 261 F.3d at 813.

Petitioners filed suit in federal district court in May 1997, challenging the authority of the Corps and EPA to require that they obtain a permit for deeply plowing wetland.

Pet. App. 4; *see also Borden Ranch*, 261 F.3d at 813. The government filed a counterclaim for injunctive relief and civil penalties. *Id.*; *see also Borden Ranch*, 261 F.3d at 813. The district court granted summary judgment in favor of the government, holding that the Corps could require a permit for deep plowing in jurisdictional waters. Pet. App. 28-56. After a bench trial, the district court held that petitioners had engaged in deep plowing without a permit, and petitioners were fined $1.5 million in civil penalties. Pet. App. 5, 67-121. The district court held that petitioners had committed 358 separate Clean Water Act violations by plowing an aggregate of approximately two acres of widely dispersed intermittent linear drainages and a vernal pool. *Id.*

2. On appeal, the Ninth Circuit Court of Appeals upheld the district court's decision that the type of deep plowing engaged in by the petitioners is subject to federal regulation under Section 404 of the Clean Water Act.[2] Pet. App. 6-8; *Borden Ranch*, 261 F.3d at 815-16. The court below rejected petitioners' argument that the deep plowing was exempt under the normal farming and ranching activities

[2] The court below, however, reversed the district court's decision as to the vernal pool located on the petitioners' property, after the government conceded that that the case of *Solid Waste Agency of North Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), now precludes Corps' authority over such pools. *Borden Ranch*, 261 F.3d at 816.

exemption under the Clean Water Act, holding that the plowing constituted a new use of the ranch. Pet. App. 9-10; *Borden Ranch*, 261 F.3d at 815-16.

Petitioners argued to the Ninth Circuit court that deep plowing simply churns up the soil that is already there, placing it back basically where it came from, and thus, was only incidental fallback, not subject to Section 404 regulation, citing *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). Pet. App. 6-8; *Borden Ranch*, 261 F.3d at 814.

The court below rejected that argument, too, holding that deep plowing should require a permit because "activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else." Pet. App. 7-8; *Borden Ranch*, 261 F.3d at 814-15. The court below distinguished the decision of the D.C. Circuit Court of Appeals in *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), which held that "incidental fallback" is not a redeposit subject to regulation under the Clean Water Act. The Ninth Circuit stated that, "[h]ere, the deep ripping does not involve mere incidental fallback, but constitutes environmental

damage sufficient to constitute a regulable redeposit." Pet. App. 8 n.2; *Borden Ranch*, 261 F.3d at 815 n.2.

In dissent, Judge Gould observed that "[f]armers have been altering and transforming their crop land from the beginning of our nation, and indeed in colonial times." Pet. App. 18; *Borden Ranch*, 261 F.3d at 819 (Gould, J. dissenting). Looking at the Clean Water Act, he saw nothing that prohibited deep plowing, which is a traditional farming activity. Pet. App. 18-22; *Borden Ranch*, 261 F.3d at 819-21. Judge Gould further concluded that since there was no significant removal or addition of material to the site, the Clean Water Act's prohibition on the addition of a pollutant into the nation's waters did not apply. *Id.* He flatly rejected the majority's decision holding that mere ecological disturbance of a wetland violated the Clean Water Act: "The ground is plowed and transformed. It is true that the hydrological regime is modified, but Congress spoke in terms of discharge or addition of pollutants, not in terms of change of the hydrological nature of the soil." Pet. App. 19; *Borden Ranch*, 261 F.3d at 820. The dissent, thus, concluded that "[i]f Congress intends to prohibit so natural a farm activity as plowing, and even the deep plowing that occurred here, Congress can and should be explicit." *Id.*

SUMMARY OF ARGUMENT

In the Federal Water Pollution Control Act, commonly known as the Clean Water Act, Congress prohibited the discharge of a pollutant into the nation's waters, without a permit from the Corps. *See* 33 U.S.C. § 1311(a) (1995 & Supp. 2002); 33 U.S.C. § 1344(a),(d) (1987 & Supp. 2002). The nation's waters have been interpreted to include wetlands adjacent to navigable waters. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985) ("The regulation extends the Corps' authority under § 404 to all wetlands adjacent to navigable or interstate waters and their tributaries."). The Clean Water Act defines discharge as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2000 & Supp. 2002). A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A pollutant is defined as "dredged spoil, ... biological materials, . . . rock, sand, [and] cellar dirt." 33 U.S.C. § 1362(6).

The court below redefined the prohibited act to be not the discharge of a pollutant, but the destruction of the ecology:

> These cases recognize that activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else. In this case, the Corps alleges that Tsakopoulos has essentially poked a hole in the bottom of protected wetlands. That is, by ripping up the bottom layer of soil, the water that was trapped can now drain out. While it is true, that in so doing, no new material has been "added," a "pollutant" has certainly been "added." Prior to the deep ripping, the protective layer of soil was intact, holding the wetland in place. Afterwards, that soil was wrenched up, moved around, and redeposited somewhere else. We can see no meaningful distinction between this activity and the activities at issue in Rybachek and Deaton. We therefore conclude that deep ripping, when undertaken in the context at issue here, can constitute a discharge of a pollutant under the Clean Water Act.

Pet. App. 7-8; *Borden Ranch*, 261 F.3d at 814-15.

The danger of adopting this new definition of the Clean Water Act's prohibition is that it would make illegal all manner of activities that the Corps itself has said are beyond the reach of the Clean Water Act. For example,

mowing grass or cutting down trees, removing animal communities, adding plants (whether farming or landscaping), all change the ecology, which is defined as the "branch of biology that deals with the relations between living organisms and their environment." WEBSTER'S NEW TWENTIETH CENTURY UNABRIDGED DICTIONARY 574 (2d ed. 1966). Yet, as the Corps itself has recognized, the Corps's Clean Water Act regulations do not require a permit for any of these actions, even though they may destroy the ecology of the wetland:

> [A]ctivities that would generally not be regulated include discing, harrowing, and harvesting were soil is stirred, cut or turned over to prepare for planting of crops. These activities involve only minor redistribution of soil, rock, sand, and other surface materials. The use of K-G blades and other forms of vegetation cutting such as bush hogging or mowing that cut vegetation above the soil line do not involve a discharge of dredged material. . . . [T]he use of equipment to cut trees above the roots that does not disturb the root system would not involve a discharge. . . . [A]lthough significant adverse environmental effects can result from activities undertaken using mechanized earth-moving equipment, the jurisdictional basis is the presence of regulable discharges.

Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," Final Rule, 66 Fed. Reg. 4550, 4554-55, 4557 (2001).

While the Corps, by its actions, has spoken to the contrary, the regulations also do not prohibit routine beach maintenance activities such as raking and smoothing of surface beach sand, removal of vegetation and debris, and other general maintenance activities designed only to insure a clean and healthy beach. Such activities should not require a Section 404 permit because they result only in "minor redistributions of soil, rock, sand, and other surface materials." 66 Fed. Reg. at 4554.

Accordingly, *Amicus Curiae* SOS urges this Court to hold that Congress, in prohibiting the discharge of a pollutant without a permit, does not prohibit other acts (including routine beach maintenance), as the Corps and EPA themselves have said. If Congress wishes to expand the Clean Water Act to encompass destruction of the ecology of a wetland, it should do so. *See* Corey Burnham, Note, *The Tulloch Rule: Its Rise, Demise & Resurrection*, 33 CONN. L. REV. 1349 (2001) ("Whatever approach ultimately is taken, the long echoed calls to amend the Clean Water Act must continue until they are heard.").

ARGUMENT

ADOPTION OF THE COURT BELOW'S NEW DEFINITION OF THE CLEAN WATER ACT'S PROHIBITION WOULD MAKE ILLEGAL ALL MANNER OF ACTIVITIES, INCLUDING THOSE THAT RESULT ONLY IN INCIDENTAL FALLBACK, WHICH THE CORPS ITSELF HAS SAID ARE BEYOND THE REACH OF THE CLEAN WATER ACT.

The court below adopted an interpretation of the Clean Water Act that leaps over the "discharge," "point source," and "pollutant" prohibition created by Congress, and substituted a "disrupts the ecology" standard that has no basis in the text or history of the statute.

As the dissent in the court below stated, "Congress spoke in terms of discharge or addition of pollutants, not in terms of change of the hydrological nature of the soil." Pet. App. 19; *Borden Ranch*, 261 F.3d at 820. Section 301(a) of the Clean Water Act prohibits only the discharge of a pollutant without a permit. 33 U.S.C. § 1311(a) (1995 & Supp. 2002). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A) (2000 & Supp. 2002).

Although this Court has held that the Clean Water Act gives the Corps authority to regulate navigable waters in

addition to non-navigable waters, such as wetlands (*see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)), Congress has not expanded the Corps's authority to regulate acts that do not involve the discharge or addition of a "pollutant" into those waters. *See, e.g., National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 585-86 (6th Cir. 1988) ("Just as in *Gorsuch* the release of storage dam water low in dissolved oxygen, and containing heat, dissolved minerals and nutrients, and sediment did not constitute an addition of a pollutant to navigable waters, so in the instant case the release of turbine generating water containing entrained fish does not constitute the addition of any pollutant to navigable waters. . . . For the Ludington facility, the fish, both dead and alive, always remain within the waters of the United States, and hence cannot be added."); *Greenfield Mills, Inc. v. O'Bannon,* 189 F. Supp.2d 893, 907 n.14 (N.D. Ind. 2002) ("[I]t appears clear to the court that a discharge that results from maintenance, which is what occurred here, would fall squarely within the maintenance exception."); *Froebel v. Meyer,* 13 F. Supp.2d 843 (E.D. Wis. 1998) (holding redeposit of sediment during removal of dam was not discharge of dredged material subject to Clean Water Act).

In 1993, the District Court for the District of Columbia invalidated a 1993 Corps regulation purporting to extend the Corps's jurisdiction to include activities which, although they do not add a pollutant, result in "incidental fallback" of soil to essentially the place from which it was taken (the "Tulloch Rule").[3] *American Mining Congress v. United States Army Corps of Engineers*, 951 F. Supp. 267 (D.D.C. 1997), *aff'd sub nom., National Mining Ass'n v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). There the court said:

> The Court concludes that neither § 301 nor § 404 covers incidental fallback. . . . . In common dredging practices, excavation is followed by the disposal of dredged material at another location. Thus, Congress understood the "discharge of dredged material" to involve the moving of material from one place to another. . . . Incidental fallback associated with excavation or landclearing does not add material or move it from one location to another; some material simply falls back in the same general location from which most of it was removed. Congress' use of the term "specified disposal sites" underscores this reading as it conveys Congress' understanding that discharges would result in the relocation of material from

[3] Because this regulation was promulgated in response to the case, *North Carolina Wildlife Federation v. Tulloch*, No. C90-713-CIV-5-BO (E.D. N.C.1992), it become known as the "Tulloch Rule."

> one site to another. . . . The Court finds that the Tulloch rule exceeds the scope of the agencies' statutory authority and, accordingly, declares it invalid and sets it aside.

Id. at 272-74, 278.

The D.C. Circuit and other federal courts have affirmed the rule in *American Mining Congress*, holding that replacement of soil in essentially the same place from which it came is not the "addition of a pollutant" as defined by Congress. *See National Mining Ass'n v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) ("We agree with the plaintiffs, and with the district court, that the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge."); *see also United States v. Bay-Houston Towing Co.*, 33 F. Supp.2d 596, 605 (E.D. Mich. 1999) ("Unlike incidental fallback, these activities involve purposeful relocation. . . . Bay-Houston removes materials from the bog and, after a varying period of time, deliberately redeposits the materials in other locations within the bog at varying distances.").

Following the invalidation of the Tulloch Rule, both the Corps and the EPA have interpreted the Clean Water Act to exclude incidental fallback resulting from activities occurring in wetlands, defining those excluded activities as "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States." 33 C.F.R. § 323.2(d)(1) (2002); *see also* 40 C.F.R. § 232.2(1)(iii) (2002); *see also* Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," Final Rule, 66 Fed. Reg. 4550, 4552 (2001).[4] The Corps defines "incidental fallback" as the:

> redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

33 C.F.R. § 323.2(d)(2)(ii); *see also* 40 C.F.R. § 232.2(2)(ii).

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[4] The Corps and EPA made their first major revision to the invalidated Tulloch Rule on May 10, 1999. *See* Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," Final Rule, 64 Fed. Reg. 25,120 (1999).

The Corps and EPA further explain their interpretation of the limits placed upon their jurisdiction by Congress: "[A]lthough significant adverse environmental effects can result from activities undertaken using mechanized earth-moving equipment, the jurisdictional basis is the presence of regulable discharges" and "the transport of dredged material downstream or the release of previously bound-up or sequestered pollutants (which are in and part of the dredged material) may constitute a discharge, not by virtue of associated environmental impacts, but by virtue of being added to a new location in waters of the U.S." 66 Fed. Reg. at 4557. The Corps and EPA went even further in the preamble to the current final rule, rejecting a commenter's argument that regulatory authority should be based on the "environmental effects" of an activity:

> We agree that the evidence presented points to the harmful environmental effects that can be associated with redeposits of dredged material incidental to excavation activity within a particular water of the United States, even those redeposits occurring in close proximity [to] the point of initial removal. To the extent commenters believe that we should determine the scope of our jurisdiction based on such environmental effects, however, we decline to do so. As stated previously, today's rule does not adopt an effect-based test to determining whether a redeposit is regulated, but instead

> defines jurisdiction based on the definition of "discharge of a pollutant" in the Act and relevant caselaw. We have chosen to define our jurisdiction based not on the effects of the discharge, but on its physical characteristics- *i.e.*, whether the amount and location of the redeposit renders it incidental fallback or a regulated discharge.

66 Fed. Reg. at 4564. Rejecting the "disruption of the ecology" interpretation adopted by the court below, the Corps and EPA have thus reaffirmed the Congressional limitation of their regulatory jurisdiction to include only addition of a pollutant to the nation's waters, stating that the "presence of a 'discharge' of dredged or fill material into waters of the U.S. is a prerequisite to jurisdiction under section 404." 66 Fed. Reg. at 4557.

Thus, the Corps and the EPA regulations specifically exclude routine activities that would appear to include the kind of deep plowing engaged in by petitioners and, most certainly, would exclude the routine beach maintenance activities engaged in by the SOS homeowners: "The term discharge of dredged material does not include the following . . . incidental fallback." 33 C.F.R. § 323.2(d)(3)(iii); 40 C.F.R. § 232.2(3)(iii). Importantly, and also contrary to the decision by the court below in this case, nothing in this rule

purports to expand the Corps's jurisdiction over activities that harm a wetland ecology or damage the environment.

Furthermore, the court below must defer to an agency interpretation that is reasonable and consistent with the intent of Congress. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) ("An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress.") (citations omitted).

Despite the clear limits of Clean Water Act regulatory jurisdiction delineated by Congress, and endorsed by the regulatory agencies themselves, the Department of Justice has boldly sought to expand Clean Water Act jurisdiction by prosecuting landowners whose actions disrupt the ecology without adding a pollutant to the wetland. For example, in the Saginaw Bay area of Lake Huron, Michigan, where SOS members reside, the Corps has launched an enforcement initiative against lakefront homeowners designed to deter homeowners from engaging in the kinds of routine beachfront maintenance activities that they have been performing for over a century. These activities include raking and beach smoothing activities that would appear to be within the Corps's definition of incidental fallback, and thus outside the reach of Corps's jurisdiction. *See* 33 C.F.R.

§ 323.2(d)(2)(ii). This enforcement initiative brought under essentially the same provisions at issue in this case, Sections 301(a) and 404 of the Clean Water Act, consists of three separate enforcement actions brought against beachfront homeowners, two of which resulted in the entry of consent decrees, and one that is being challenged by homeowners, the Kincaids. *See* Draft Consent Judgment at ¶¶ 12, 13, *United States v. Stuart*, No. 02-10054 (E.D. Mich. Feb. 27, 2002) (imposing civil penalty of $10,000 and enjoining property owner from performing, without a Corps permit, beach maintenance activities, including those that would "adversely affect or impede the natural vegetation process of this area"); Compl., *United States v. Groya*, No. 02-10079 (E.D. Mich. Mar. 25, 2002) (involving similar consent decree where property owner found to be in violation of the Clean Water Act for routine beach maintenance activities such as the "tilling" and "grading" of sand).

In *United States v. Kincaid*, No. 02-10149 (E.D. Mich. May 28, 2002), the Corps filed an enforcement action against the Kincaids, elderly homeowners who use a tractor to rake and smooth sand that accumulates on their beach in severe weather and throughout the winter. Typically, over the winter, winds blowing across Lake Huron causes sand to accumulate along bulkheads and temporary snow fences.

The Corps alleges in its enforcement action against the Kincaids that they have "conduct[ed] or caus[ed] to be conducted such discharges of fill by the tilling, grading or dozing of sand and sediments" in violation of the Clean Water Act. For these alleged violations the Corps seeks "a penalty of up to $25,000 per day, the exact number of days being presently unknown to the United States." Compl. at ¶¶ 4, 8, 9, *United States v. Kincaid*, No. 02-10149 (E.D. Mich. May 28, 2002).

The outcome of the present case will determine whether amici and thousands of other landowners across the nation may be held liable for penalties of up to $25,000 per day for ordinary grooming, cleaning, raking, landscaping, and a panoply of similar activities which disrupt (and generally improve) natural conditions, but do not discharge a pollutant into waters of the United States. Furthermore, this case may determine whether shoreline property owners can maintain their historically pristine, white sand beaches (*see* Ex. 1), or live with a shoreline marred by noxious weeds (*see* Ex. 2), decaying organic matter and stagnant pools of water, all of which attract pests and rodents.

If the Clean Water Act were to apply to beaches, such a ruling would have a severe negative impact on our nation's most important industry: tourism. *See* James R. Houston, *The*

Economic Value of Beaches, 2002 Update (U.S. Army Engineer Research & Development Center) (2002), *available in* (visited August 21, 2002) <http://www.virginiashore andbeach.com/valu.htm> ("'Without a paradigm shift in attitudes toward the economic significance of travel and tourism and necessary infrastructure investment to maintain and restore beaches, the U.S. will relinquish a dominant worldwide lead in its most important industry.'") (citation omitted). Each year, approximately 180 million Americans make 2 billion visits to ocean, gulf, and inland beaches. *Id.* (citing Clean Beaches Council, *The Blue Wave Campaign, Protecting a Precious Resource at Risk* (2001)). In 1992, beaches contributed about $170 billion annually to the economy. *Id.* (citing U.S. Travel and Tourism Administration, *World Tourism at the Millennium* (U.S. Department of Commerce 1993)).

Accordingly, amicus curiae urges this Court to reject this expansive assertion of the Corps's jurisdiction over activities not reached by the plain language of the Clean Water Act or the current Corps and EPA regulations. *See Solid Waste Agency of North Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that

Congress intended that result."); *see also Borden Ranch*, 261 F.3d at 819 (Gould, J. dissenting) ("The policy decision involved here should be made by Congress . . . The alternatives are an agency power too unbounded or judicial law-making, which is worse.").

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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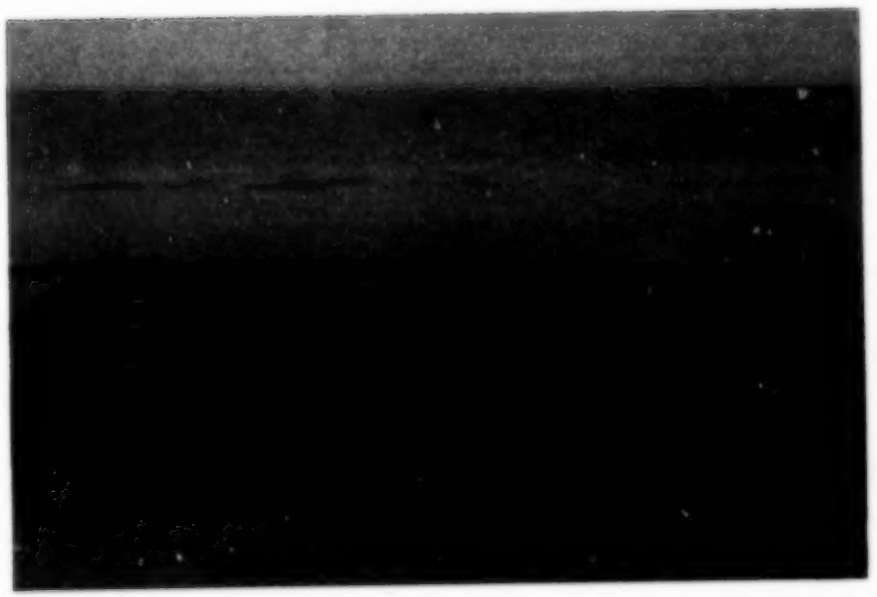
EXHIBIT 1

EXHIBIT 2



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In The

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS,

Petitioners,

v.

UNITED STATES ARMY CORPS
OF ENGINEERS; UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

AMICUS BRIEF OF ASSOCIATION OF STATE WETLANDS MANAGERS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The Association of State Wetland Managers ("ASWM") submits this brief amicus curiae in support of Respondent United States.[1]

ASWM is a nonprofit federal 501(c)(3) membership organization dedicated to the protection and management of the Nation's wetland resources. The goals of the Association include the following: translate wetland science into fair and reasonable government policies; help states develop and implement wetland regulatory and management programs; improve the coordination of wetland programs and policies at all levels of government; facilitate the integration of wetlands into water resources and watershed management; and build conservation and restoration partnerships among states, tribes, local governments, not-for-profits, and other interested parties.

The primary purpose of this brief is to underscore the importance of the section 404 program of the Clean Water Act ("CWA") to the conservation of the nation's remaining wetlands, and to urge that Congress' careful balance of federal and state responsibilities under the CWA be preserved. Over the past 30 years, an effective federal-state partnership has been forged under the 404 program that has led to dramatic reductions in wetlands destruction nationwide. The success of this program depends upon the comprehensive regulation of activities that destroy wetland functions and values by dredging and filling. As will be shown, the conversion of wetlands and other waters of the United States to drylands through the

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[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party in this case authored any part of this brief, and no person other than amici or its counsel made a monetary contribution to the preparation or submission of this brief. See Sup. Ct. Rule 37.

process of "deep-ripping" is exactly the type of activity Congress sought to control through the 404 permit program.[2]

SUMMARY OF ARGUMENT

This case is not about the routine "plowing" of agricultural fields. It is about the use of bulldozers, tractors and specialized earthmoving equipment to convert aquatic areas to non-aquatic areas resulting, as the trial court found, in the "obliteration" of the nation's waters.

Petitioners' "deep-ripping" of the streams and wetlands on their property involves the "discharge [of] dredge and fill material" to "waters of the United States" from a "point source," thereby triggering the permit requirements of sections 301 and 404 of the CWA. The point sources are bulldozers and tractors equipped with specialized implements designed to break up compacted soil, including the impervious subsoil layers that maintain the hydrological integrity of the wetlands, disgorge large amounts of soil, rock, sand, clay, and biological materials, and redistribute (i.e., "add") these transformed materials (i.e., "pollutants") from uplands to wetlands, as well as from within the wetlands themselves, thereby filling and permanently destroying them. This is precisely the kind of activity Congress sought to regulate under section 404 of the CWA, as emphatically demonstrated in the 1977 CWA Amendments.

The type of activity undertaken here is not a "normal farming or ranching practice," and does not qualify for the "agricultural exemption" under section 404(f). To qualify

[2] ASWM has elected to brief only the first two questions certified by the Court and takes no position on the penalty calculation issue.

for this exemption, Petitioners must demonstrate, first, that their activity meets the strict requirements of section 404(f)(1); and, second, that the activity is not "recaptured" under section 404(f)(2). Petitioners cannot meet either test.

First, to qualify as a "normal" farming or ranching practice the activity must be part of an ongoing, established farming or ranching operation. Prior to Petitioners' acquisition in 1993, Borden Ranch was a working cattle ranch. Petitioners bought it to convert the rangeland to orchards and vineyards before subdividing it and selling it off. Deep-ripping had never been used on the land. Rather, deep-ripping was employed to physically change the land and its hydrological regime so that the property could be put to new and different horticultural and developmental uses.

Second, deep-ripping wetlands does not qualify as "plowing" under Army Corps of Engineer ("Corps") and Environmental Protection Agency ("EPA") regulations because it involves "the redistribution of soil, rock, sand or other materials in a manner which changes [an] area of the waters of the United States to dry land." The District Court's factual findings describe in detail how deep-ripping tears apart compacted soils and impervious layers, and redistributes the disgorged materials both horizontally and vertically, resulting in the filling of wetlands and streams.

Finally, even if deep-ripping could, in some situations, be considered a "normal farming practice," the conditional (f)(1) exemption does not apply where the discharge of dredge or fill material is "incidental to an activity whose purpose is to convert an area of waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters

reduced." Petitioners' deep-ripping was clearly designed to convert the streams and wetlands into a use to which they were not previously subject, to change the bottom elevation, and to alter the flow and circulation of such waters, in plain contravention of section 404(f)(2).

ARGUMENT

I. WETLAND CONSERVATION IS IN THE NATIONAL INTEREST

It was no accident that Congress included a special provision, section 404, to protect the nation's wetlands. The rich diversity of wetlands that dot the American landscape – swamps, marshes, bogs, fens, sloughs, prairie potholes, playa lakes, vernal pools, swales – are the primary pollution control systems of the nation's waters. See Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* 48-52 (1983). They remove heavy metals at efficiencies ranging from twenty to one hundred percent. *Id.* at 49. They remove up to ninety-five percent of phosphorous, nutrients and conventional pollutants, the equivalent of a multi-million dollar treatment system. See Houck and Rolland, "Federalism in Wetlands Regulation: A Consideration Of Delegation Of Clean Water Act Section 404 and Related Programs To The States," 54 Md. L. Rev. 1242, 1248 (1995) (hereafter, *Houck & Rolland*). They purify and recharge groundwater, providing safe drinking water supplies for thousands of towns and cities and across the nation. *Id.* They provide critical spawning and nursery habitat for commercial and recreational fish and shellfish worth over $3 billion a year. See USEPA, Economic Benefits of Wetlands, www.epa.gov/owow/wetlands/facts/fact4.html. They are the last refuge of some 43% of federally-listed threatened and endangered species. See Niering, W.A., Endangered, Threatened And Rare Wetland Plants And Animals Of The Continental United States, in *The Ecology and Management of*

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Perhaps the most dramatic of the many "ecosystem services" that wetlands provide is flood control. In 1993, for example, the Mississippi River experienced the most devastating flood in the nation's history.[3] Over 50 people lost their lives; damages were between $12 and $16 billion.[4] A special task force assembled to study the cause of this disaster concluded that wetland loss throughout the Upper Basin was a significant contributing factor. See Scientific Assessment and Strategy Team, "Science for Floodplain Management into the 21st Century," Chapter 3 (June 1994). Noting that over 80% of the wetlands along the river have been drained since the 1940's, the report recommended greater emphasis on "non-structural" measures, including restoration of wetland and flood-plain functions to prevent a recurrence. *Id.*, Chapter 5; see also, Hey, D.L. and Philippi, N.S., "1995 Flood Reduction through Wetland Restoration: The Upper Mississippi River Basin as a Case History," Restoration Ecology 3: 4-17 (2000).

Congress has long known about the vital role that wetlands play in achieving water quality and flood control. In the Senate Report on the 1977 Amendments to the CWA, Congress stated:

> The wetlands and bays, estuaries and deltas are the nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish

---

[3] See generally, U.S. Army Corps of Engineers, Welcome to the Corps of Engr's 1993 Flood Data, Feb. 19, 1998 at http://www.wes.army.mil/EL/flood/fl93home.html.

[4] *Id.*

> and shellfish which populates [sic] the oceans, and they are passages for numerous inland gamefish. They also provide nesting areas for a myriad of species of birds and wildlife. There is no question that the systematic destruction of the nation's wetlands is causing serious, permanent ecological damage.

S. Rep. No. 370, 95th Cong. 1st Sess. at 10 (1977).

The 95th Congress clearly intended the 404 program to halt this "systematic destruction" of wetlands. As Senator Edmund Muskie, the principal sponsor in the Senate of the 1977 Amendments, remarked: "The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve." 123 Cong. Rec. S26697 (daily ed. Aug. 4, 1977). Senator Robert Stafford, another key sponsor of the 1977 Amendments, underscored this intent: "[T]he section 404 program as outlined in the committee bill will be a successful and reasonable process for protecting inland and coastal waters, including wetlands from adverse environmental effects resulting from the discharge of dredged or fill material." *Id.* at S26701.

Similar sentiments were expressed on the House side. Representative Newton Steers of Maryland, the floor manager of the House bill, stated:

> "The lasting benefits that society derives from coastal and inland wetlands often far exceed the immediate advantage their owners might get from draining or filling them. * * * The Committee recognizes the need for a program which regulated (sic) the discharge of dredged or fill material into our waters and wetlands."

123 Cong. Rec. H30994-5 (daily ed. Sept. 26, 1977).

II. THE CLEAN WATER ACT REFLECTS A THOUGHTFUL CONGRESSIONAL BALANCING OF FEDERAL AND STATE RESPONSIBILITIES TO ACHIEVE THE NATION'S WATER QUALITY GOALS

As this Court has recognized, the CWA is a "complex statutory and regulatory scheme that governs our Nation's waters, a scheme that implicates both federal and state administrative responsibilities." *PUD No.1 of Jefferson County v. Washington Dep't of Ecology,* 114 S.Ct. 1900, 1904 (1994) (*PUD No.1*). The central objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). The Act also seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. §1251(a)(2). To achieve these ambitious goals, the CWA establishes distinct roles for the federal and state governments. Under the Act, the Administrator of the Environmental Protection Agency (EPA) is required, among other things, to establish and enforce technology-based limitations on individual discharges into the country's navigable waters from point sources. See 33 U.S.C. §§1311, 1314. Section 303 of the Act also requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. 33 U.S.C. §1313(b)(1)(C).

In recognition of the important role that states and tribes have to play in achieving the objectives of the CWA and the 404 program, Congress incorporated a number of opportunities for them to take an active part in conserving the nation's wetlands. For example, under section 404(g), a state or approved Indian Tribe may apply to EPA to administer its own permit program for the regulation of dredge and fill activities in lieu of the federal program

administered by the Corps, except in "traditionally navigable waters," such as tidal waters and the Great Lakes. 33 U.S.C. §1344(g). Under section 404(e), the Corps has created a category of general permit called a "state programmatic general permit" (SPGP). See 33 C.F.R. §325.5(c). The Corps defines SPGP's as "a type of general permit founded on an existing state, local, or other Federal agency program and designed to avoid duplication with that program." 33 C.F.R. §325.5(c)(3).

One of the most important provisions of the CWA is section 401. This section requires applicants for federal permits that involve any discharge of a pollutant to navigable waters to obtain certification from the state in which the discharge originates. 33 U.S.C. §1341(a). States may either "veto" federal permits or licenses by withholding certification, or impose conditions upon federal permits requiring compliance with state water quality laws. *PUD No.1*, 114 S.Ct. at 1904-05. This Court has held that section 401 certification applies to dredge-and-fill activities in wetlands and other waters that require permits from the Corps under section 404 of the CWA. *Id.* at 1914.

Approximately two-thirds of the states have no laws regulating destruction or degradation of freshwater wetlands.[5] *Houck & Rolland*, at 1283-84. For these states, the section 401 certification is the sole mechanism for controlling federally permitted activities that impact wetlands. Section 401 represents a critical tool to protect the chemical, physical and biological integrity of the waters within these states. See generally, Congressional

[5] Freshwater wetlands comprise 85% of the wetlands in the country. U.S. Dep't of Interior, Paper on Wetlands Loss in the United States, available at http://wetlands.fws.gov/sandT/download/SandT paper.pdf.

Research Service, *"Clean Water Act §401: Background and Issues"* (Oct. 4, 1998), available at http://cnie.org/NLE/CRS reports/water/h20-3.cfm.

A. Reducing Federal Jurisdiction Under the Clean Water Act Disrupts State Programs and Frustrates the Federalism Goals of the Clean Water Act.

Over the 30 year history of the CWA, state and federal wetlands programs have become increasingly interdependent and complementary. States look to the federal government to "level the playing field" so that states that regulate wetland impacts are not placed at an economic disadvantage when others do not, the so-called race-to-the-bottom problem. See Engels, "State Environmental Standard-Setting: Is There a "Race" and Is It to the "Bottom?" 48 Hastings L.J. 271, 351 (1997) (concluding that the empirical evidence confirms the existence of "sub-optimal standards" resulting from interstate competition for development, i.e., a race to the bottom). The federal government looks to the states to provide better constituent service and to integrate wetland conservation with broader land and water management programs. The states rely on the federal government for technical and financial assistance; the federal government relies on the states for more detailed knowledge of local conditions and compliance monitoring. Working together as partners, state and federal agencies have made steady progress towards the goal of reducing wetland losses.

The *Newdunn* case in Virginia provides an example of how interwoven federal and state programs have become, and how court rulings on federal jurisdiction can have negative effects on state programs. In *United States v. Newdunn Associates,* 195 F.Supp.2d 751, 767-8 (E.D. Va. 2002) the District Court ruled that certain wetlands were

not subject to federal jurisdiction because they lacked the requisite hydrological connection to "navigable waters." However, the District Court went further, ruling that the State of Virginia also lacked jurisdiction because "the term 'wetlands' is defined identically by the state statute as by the Corps regulations." *Id.* at 769. The court elaborated:

> The language in the state statute defining wetlands as land so delineated by the Corps and over which the Corps has jurisdiction under the CWA [citations omitted] and establishing the permitting process as coextensive with the permit required under the CWA [citations omitted] makes it clear that the state statute is coextensive with the CWA. *Id.*

A ruling that exempts deep-ripping and similar wetland-destroying activities from the 404 program would have several negative consequences for the states and the nation. First, it would deprive two-thirds of the states of the one tool they now have – section 401 water quality certification authority – to insure that federally permitted activities do not violate water quality standards and degrade wetlands. Second, it would undercut the third of the states that have wetland programs by placing them at a competitive disadvantage with states that do not. Third, it would undermine the principal objective of the CWA to restore and maintain the chemical, physical and biological integrity of the nation's waters.

B. The 404 Permit Program Has Proven an Effective Tool for Accomplishing the National Goal of "No Net Loss" of Wetlands.

The United States has lost 53% of its wetlands to draining and filling for agricultural and developmental activities. See Dahl, T.E. "Wetland Losses in the United States 1780's to 1980's," U.S. Department of Interior, Fish

and Wildlife Service, 3 (1990). Out of an original inventory of 224 million acres, approximately 105 million remain. *Id.* Prior to the mid-70's, the nation was losing between 300,000 and 400,000 acres of wetlands each year. See National Research Council, National Academy of Sciences, *Compensating Wetland Losses Under the Clean Water Act*, Table1-1 (2002). With the implementation of the section 404 program and other federal wetland conservation programs starting in the late 1970's, the rate began to decline.

In 1989, former President George Bush announced a national goal of "no net loss" of wetlands, and directed all federal agencies to use their authorities to achieve this goal. This policy is credited with bringing about a dramatic reduction in wetland losses. Currently the rate of loss is down to 58,000 acres a year.[6] See U.S. Department of Interior, "*Status and Trends of Wetlands in the Coterminous United States 1986 to 1987*," (January 9, 2001) available at ftp://wetlands.fws.gov/status-trends/SandT2000Report_loures.pdf. This report observes:

> In recent years, the Army Corps of Engineers and the U.S. Environmental Protection Agency have improved the effectiveness of wetlands regulation under Section 404 of the Clean Water Act. This has been accomplished by reducing losses from the use of general permits, addressing discharges of dredged material to the extent permissible under current law, and improving forestry practices in wetlands. These agencies

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[6] Notably, agriculture continues to account for the largest loss of wetlands in the western United States. See USDA, Natural Resources Conservation Service, 1997 Natural Resources Inventory (revised December 2000), at 10, available at http://www.nrcs.usda.gov/technical/NRI/1997/summary_report/report.pdf.

> have also developed innovative ways to compensate for unavoidable damages to wetlands, and have worked more closely with State, Tribal and local government toward fair, flexible, and effective protection.

Id. at 3.

Future progress depends on maintaining the effective federal-state partnership Congress created under the 404 program.

III. DEEP-RIPPING IN JURISDICTIONAL WETLANDS IS A REGULATED ACTIVITY UNDER CWA SECTION 404

Section 301(a) of the CWA prohibits any discharge of dredge or fill material from a point source into "waters of the United States" unless authorized by a permit issued by the Corps pursuant to section 404 of the CWA. 33 U.S.C. §1311(a); *United States v. Riverside Bayview Homes*, 106 S.Ct. 455, 463 (1985) (*Riverside*). It is undisputed that the swales and streams involved here are "waters of the United States," or jurisdictional waters.[7] Nor do Petitioners dispute the fact that the hydrology of the affected waters "has been altered significantly" and that several of the waters were "completely obliterated." Pet. App. 106. The only issue is whether this "obliteration" of jurisdictional waters involved the discharge of dredge or fill material from a point source. Based on the facts as found

[7] The District Court found that the wetlands and streams are hydrologically connected to two interstate rivers, the Columnes River and the Mokelumne River in Northern California. See *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, No. CIV. S97-0858 GEBJFM, 1999WL 1797329, *2 (Nov. 8, 1999) (*Borden I*).

by the trial court, and the clear weight of judicial authority, deep-ripping meets the statutory definition of a discharge of dredge or fill material.

A. Bulldozers and Tractors Equipped with Mechanical Devices That Break Apart and Redistribute Soil, Rock, Sand, Clay and Biological Materials Are "Point Sources."

The CWA defines a point source as "any defined, discrete conveyance including but not limited to any * * * rolling stock * * * from which pollutants are or may be discharged." 33 U.S.C. §1362(14). Congress deliberately chose a broad definition of this keystone term in order to encompass the widest number of sources of pollution discharges within the permit programs of the CWA. See *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979) (statutory list of point sources meant to be illustrative, not exclusive). The lower courts have found that a wide variety of vehicles, machinery and equipment similar to that used in deep-ripping are point sources. See *Avoyelles Sportsman's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983) (*Avoyelles*) (bulldozers, backhoes and discs); *United States v. Weisman*, 489 F.Supp. 1331 (M.D. Fla. 1980) (dump trucks); *United States v. Sinclair Oil Co.*, 767 F.Supp. 200, 204 (D Mt. 1990) (bulldozers); *United States v. Holland*, 373 F.Supp. 665 (M.D. Fla. 1974) (draglines); *United States v. MCC of Florida*, 772 F.2d 1501 (11th Cir. 1985), *cert. granted, vacated on other grounds*, 107 S.Ct. 1968 (1987) (boat propellers); *United States v. Fleming Plantation*, 12 ERC 1705 (E.D. La. 1978) (marsh buggies); *Rybacheck v. U.S. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (placer mining dredge) (*Rybacheck*); *United States v. Huebner*, 725 F.2d 1235, 1241 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 62 (1986) (marsh plow).

As the District Court found, the "plows" in question here are actually "D-10 and D-11 Caterpillars pulling

seven-foot long metal prongs, discs and rollers" through the jurisdictional waters. E.R. 464 ¶'s 5,6; ¶ 8; 467-68. This is heavy equipment, designed to disgorge rock, sand, soil and biological material, break up clods, and move this material across large areas of the landscape, filling wetlands and streams in the process. See ER, 519 (Amended Order granting Summary Judgment, Aug. 3, 1998).

This case is very similar to the situation presented in *Avoyelles* where bulldozers fitted with shearing blades and rakes were used to cut trees, move soil and vegetation, and redistribute the resulting debris to fill low-lying areas. The Fifth Circuit held that this type of equipment constituted point sources:

> Further, we agree with the district court that the bulldozers and backhoes were "point sources," since they collected into windrows and piles material that may ultimately have found its way back into the waters.

715 F.2d at 922. Similarly, in *United States v. Brace*, 41 F.3d 117, 127 (3d Cir. 1994), *cert. denied*, 115 S.Ct. 2610 (1995) (*Brace*) the Third Circuit held that a farmer who had "cleared, mulched, churned, leveled, and drained" a wetland without a permit violated section 404.

B. Redistribution of Soil, Rock, Clay and Biological Material Constitutes the "Addition of Fill Material" to Waters of the United States.

The crux of Petitioners' argument is that deep-ripping does not involve the "addition" of any "pollutant." Pet. Br. at 20-21. Petitioners do not deny that deep-ripping destroys wetlands; it simply claims that Congress never intended to regulate this kind of wetland destruction under section 404. However, Petitioners fail to explain why Congress would create such an odd loophole.

By its terms, section 404 regulates the "discharge of dredge or fill material" into waters of the United States. 33 U.S.C. §1344(a). "Dredge spoil" is a subset of the term "pollutant." 33 U.S.C. §1362(16). "Fill material" is defined by Corps regulations to mean "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. §323.2(e). The term "discharge of fill material" is defined to mean "the addition of fill material into waters of the United States." 33 C.F.R. §323.2(f).

According to the government's expert at trial, Dr. Lyndon Lee, whom the District Court found to be the "most authoritative" witness,[8] this is exactly what deep-ripping does:

> The bulldozers and tractors and attached rippers, discs, and rollers carry and drag along large clods of dirt and biological material such as plant stems and roots from surrounding upland areas into vernal pools, swales, and intermittent streams, causing them to fill with dirt as well as to lose their ability to hold and convey water. This movement of soil results in a conversion of aquatic areas to dry land. The bulldozers and tractors and attached rippers, discs and rollers also break up, mix, and turn over the soil and biological material already in the pools, swales, and streams and redeposits them in those waters. This replaces aquatic areas with dry land, raises the bottom elevation, alters the pattern of flow and circulation of the water, and reduces the reach of such waters.

Affidavit of Lyndon Lee (May 1998), Supplemental Record Excerpts PDF file at 123.

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[8] See *Borden I*, 1999 WL at * 9.

Based on Dr. Lee's report and other evidence adduced at trial, the District Court found that "deep-ripping on Borden Ranch caused fill material to be discharged into 35 hydrological features."[9] Petitioners attack this finding on the ground that "nothing is added that was not already there." Pet. Br. at 24. However, this argument has been squarely rejected in a number of cases. For example, in *United States v. Deaton*, 209 F.3d 331, 335-36 (4th Cir. 2000), the Fourth Circuit held that the practice of "side-casting" excavated material back into the wetland constituted the addition of a pollutant:

> [The Deatons] argue that the "ordinary and natural meaning of 'addition' means something *added*, i.e., the addition of something not previously present." Contrary to what the Deatons suggest, the statute does not prohibit the addition of material; it prohibits "the addition of any pollutant." The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here. In the course of digging a ditch across the Deaton property, the contractor removed earth and vegetable matter from the wetland. Once it was removed, that material became "dredged spoil," a statutory pollutant and a *type* of material that up until then was not present on the Deaton property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before.

[9] *Id.*

Similarly, in *Rybacheck*, the Ninth Circuit held that material dredged from a streambed for the purpose of extracting gold became a pollutant when reintroduced to the stream. 904 F.2d at 1285. In *Avoyelles*, the Fifth Circuit held that mechanized land-clearing which redistributed soil and biological material into wetlands is subject to section 404. The Court stated, "The word 'addition,' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit.'" 715 F.2d at 924. In *Brace*, as mentioned, the Third Circuit held that use of farm equipment to clear, mulch, level and drain a wetland involved the addition of fill material requiring a 404 permit. 41 F.3d at 127-28. In *MCC Florida*, the 11th Circuit held that "prop wash" from boat propellers constituted the addition of pollutants as a result of resuspension of sediments. ("We . . . conclude that M.C.C. did violate the Act by redepositing the vegetation and sediment on the adjacent sea grass beds.") 772 F.2d at 1506.

In short, virtually every court to have considered the question has held that redeposit of material dredged, excavated or otherwise mechanically removed from wetlands and water bodies is an addition of a pollutant triggering 404 permit requirements.

C. The Agencies' Interpretation That "Discharge" Includes "Redeposit" Is Entitled to *Chevron* Deference.

To the extent there is any doubt about whether the statutory definition of "discharge" should be read to include the filling of wetlands with soil and other materials taken from both the wetlands and surrounding uplands, the Court should defer to EPA and the Corps' expert

judgment that regulation of such activity is both reasonable and necessary to achieve statutory goals. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984) (*Chevron*). As recently construed by the Court in *United States v. Mead*, 533 U.S. 218, 227 (2001) (*Mead*). *Chevron* deference is due "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"; see also, *Barnhart v. Walton*, 122 S.Ct. 1265, 1272 (2002) (*Barnhart*) ("[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue."). The *Mead* Court stated:

> [A] reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise [citation omitted] but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable.

Mead, 533 U.S. at 227-28.

Mead establishes three tests for according *Chevron* deference to an agency's interpretation: (1) whether Congress delegated rulemaking authority to the agency, (2) whether the agency interpretation was promulgated in the exercise of that authority, and (3) whether the agency interpretation was reasonable. The agency interpretation at issue here meets these tests.

First, Congress has delegated broad rulemaking authority to EPA[10] under section 501 of the CWA: "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter." 33 U.S.C. §1361. The *Mead* Court noted the importance of such substantive rulemaking authority: "We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." 533 U.S. at 228. Further, the *Chevron* Court stated: "[W]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . . " 104 S.Ct. 2778. Finally, this Court has previously recognized that EPA's rules under the CWA are entitled to considerable deference. *Arkansas v. Oklahoma*, 503 U.S. 91, 99 (1992).

The *Mead* Court also recognized the need to defer to agency interpretations where the "[r]egulatory scheme is highly detailed and the agency can bring the benefit of specialized experience to bear on the subtle questions" that may arise. 104 S.Ct. at 229. As the Ninth Circuit stated in *Pronsolino v. Marcus*, 291 F.3d 1123, 1133 (9th Cir. 2002), the CWA is comprised of "interwoven components that together make up an intricate statutory scheme addressing technically complex environmental issues." The need for uniformity in administration of a comprehensive, complex national law like the CWA argues strongly for deference to agency judgment.

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[10] The fact that the statute does not expressly mention the Corps is not material because EPA and Corps have jointly promulgated the regulations at issue here. See 40 C.F.R. §232.2(g) and 33 C.F.R. §323.2(c).

Second, EPA and the Corps have consistently interpreted section 404 to regulate the discharge of dredge and fill material regardless of the source of the material. See 58 FR 45008, 4510-12 (Aug. 13, 1993). In promulgating the "Tulloch Rule"[11] in 1993, the agencies responded as follows to comments that regulation of "redeposited material" represented a departure from earlier rules:

> Since regulations were first promulgated implementing Section 404, the Corps has interpreted the term "dredged material" to mean any material excavated from waters subject to the full jurisdictional reach of the CWA (see 39 FR 12119, April 3, 1974), and the current language in the agencies' definition has been in existence since 1977 (see 42 FR 37145, July 19, 1977). This longstanding definition of the term "dredged material" is a straightforward and reasonable reading of the statutory language used by Congress.

Id. at 45010.

In *National Mining Ass'n v. U.S. Army Corps of Engineers,* 145 F.3d 1399, 1405 (D.C. Cir. 1998) (*NMA*) the D.C. Circuit struck down the Tulloch Rule on the ground that the Corps had "outrun" its statutory authority by attempting to regulate "incidental fallback" from dredging operations. However, the D.C. Circuit also made it clear that the CWA does not completely outlaw regulation of redeposited material. The court drew a distinction

[11] The Tulloch Rule was adopted in 1993 to close a loophole in the 404 regulations which had excluded "de minimis" discharges of dredge spoil from regulation. As a result of this exception, the discharge of some small volumes of material associated with landclearing, ditching, channelization, or other excavation activities were not consistently being regulated under 404, even though waters of the U.S., including wetlands, were being destroyed or degraded. See 58 FR 45008. (Aug. 13, 1993)

between incidental fallback and "regulable redeposit," stating: "Since the Act sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other, a reasoned attempt by the agencies to draw such a line would merit considerable deference." *Id.*

EPA and the Corps accepted the D.C. Circuit's invitation and promulgated a revised Tulloch Rule regulating discharges from "mechanized land-clearing that redeposits dredged material in a manner and amount that is different from, or greater than, incidental fallback." See 66 FR 4550, 4565 (Jan. 17, 2001).

Finally, the agencies' interpretation is reasonable in light of Congress' clear intent that the section 404 program be a primary tool to control dredging and filling in wetlands. As Senator Muskie put it, "The unregulated destruction of [wetlands] is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve." 123 Cong. Rec. S26697 (daily ed. Aug. 4, 1977). There is no evidence, or any logic, to support the argument that Congress meant to distinguish between wetlands filled with material that came from outside the wetland and material dredged from the wetland itself. Indeed, by definition, dredge spoil is material taken from a water body. It makes no sense to exclude the redeposit of dredge material from regulation simply because it happens to come from the same water body.

IV. ACTIVITIES THAT CONVERT WETLANDS TO DRYLANDS DO NOT QUALIFY FOR THE "NORMAL FARMING" EXEMPTION UNDER SECTION 404(f)

Petitioners boldly assert that "Congress intentionally excluded agriculture from section 404 regulation." Pet. Br. at 27. This completely misreads the scope of jurisdiction

under the CWA,[12] as well as what motivated Congress to amend the CWA in 1977.

The impetus for the 1977 Amendments was a "firestorm of criticism" that erupted after the Corps proposed regulations in 1976 to implement a court-ordered[13] expansion of its jurisdiction under 404, accompanied by an inflammatory press release threatening to regulate "every rancher who wants to enlarge his stock pond and every farmer who wants to deepen an irrigation ditch." See *Houck & Rolland*, at 1263. To quell the uproar from farming communities, Congress clarified the scope of the 404 program by defining a *narrow* exception for certain "normal farming, ranching and silvicultural practices" that have only minor impact on aquatic resources. As Senator Muskie, one of the chief sponsors of the 1977 Amendments, explained it:

> New subsection 404(f) provides that federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water to dry land or impede circulation or reduce the reach or size of the water body."

1977 U.S. Code Cong. & Admin. News (95 Stat.) 4326.

Petitioners suggest that this passage, and others like it, indicate an intent to broadly exempt "agricultural discharges" notwithstanding Senator Muskie's very clear statement that only a "narrowly defined" category of activities having "little or no adverse effects," even when measured "cumulatively," was intended. All of the passages quoted by Petitioners contain the same qualification that the exemption was meant for routine, well-established activities that would have minimal impact on wetlands and other aquatic resources.

A. Deep-Ripping Is Not a "Normal" Farming or Ranching Practice Within the Meaning of Section 404(f)(1).

Section 404(f)(1) provides that, "except as provided in paragraph (2)" no permit will be required for "the discharge of dredged or fill material from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." 33 U.S.C. §1344(f)(1)(A). Thus, to be exempt from the permit requirement, Petitioners must demonstrate that deep-ripping will satisfy the requirements of (f)(1) *and* avoid being "recaptured" under (f)(2). *Avoyelles*, 715 F.2d at 926; *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986) (*Akers*).

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[12] Contrary to Petitioners' assertion, Congress did not exempt "agriculture" from the permit requirements of the CWA. Indeed the 1972 Act expressly defined the term point source to include "concentrated animal feeding operations," now known as "CAFO's." 33 U.S.C. §1362(14). Moreover, as early as 1973, EPA took the position that "there is little doubt that conveyances meeting the definitional requirements of §506(14) [502(14)] are point sources, whether such conveyances appear on farms or elsewhere." Opinion of the EPA General Counsel (August 3, 1973) 1973 WL 21951. Finally, even non-CAFO farming operations have been held to constitute point sources where they collect and channel wastes into navigable waters. See *CARE v. Southview Farms, Inc.*, 34 F.3d 114, 119 (2d Cir. 1994)

[13] In *NRDC v. Callaway*, 392 F.Supp. 685 (D.D.C. 1975) the court had ruled that the Corps had adopted an unlawfully narrow scope of jurisdiction under section 404 that excluded most wetlands. The court ordered the Corps to issue new rules based on regulation of all "waters of the United States" to the fullest extent allowed by the Commerce Clause. *Id.* at 686.

To satisfy the (f)(1) requirements, Corps and EPA regulations provide that "the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., ongoing) farming, silviculture, or ranching operation and must be in accordance with definitions in 323.4(a)(1)(iii) [relating to cultivating and harvesting]." 33 C.F.R. §323.4(a)(1)(ii); see also, 40 C.F.R. §232.3(c)(1)(ii)(A). The lower courts have consistently held that this exemption must be narrowly construed and is only available for activities that are part of an established, ongoing farming or ranching operation, and that have only minimal impact on wetlands. *Avoyelles*, 715 F.2d at 925 (upholding District Court ruling that "*normal* connotes an established and continuing farming activity"); *Huebner*, 752 F.2d at 1240-41 ("Congress intended that section 1344(f)(1) exempt from the permit process only "narrowly defined activities . . . that cause little or no adverse effects either individually or cumulatively"); *United States v. Larkins*, 852 F.2d 814 (6th Cir. 1986), *cert. denied*, 109 S.Ct. 107 (1986) (silviculture exemption does not apply where activity converts wetland to cropland); *Akers*, 785 F.2d at 819 (no exemption for conversion of wetland crops to upland crops); *Brace*, 41 F.3d at 224 ("a farming operation is *not* 'ongoing' where modifications to the hydrological regime are necessary to resume operations").

Petitioners argue that the "[Corps] regulations defining 'plowing' expressly exclude *all* plowing from CWA regulation." Pet. Br. at 42 (emphasis in original). However, Petitioners ignore this important qualifying statement in the regulations:

> The term plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing.[14]

As the District Court found, this is exactly what Petitioners' activity accomplished:

> Deep ripping alters the movement of surface and subsurface water in the ripped areas by moving earth, rock, sand, and biological materials both horizontally and vertically. This limits or destroys the ability of jurisdictional waters to retain water.

Borden I, 1999 WL 1797329, at * 2.

Significantly, the Corps drew a regulatory distinction between deep-ripping on the upland portions of Petitioners' land and deep-ripping through the streams and wetlands. *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 812-13 (9th Cir. 2001) (*Borden II*). There may be many situations where deep-ripping could qualify as normal plowing, but not where it destroys waters of the United States. Merely labeling an activity "plowing" does not immunize it from regulation where it in fact alters the flow, circulation and reach of waters of the United States.

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[14] Petitioners attempt to explain away this qualification by arguing that it is only intended to distinguish "blading and grading" from "pure plowing." Pet. Br., at 43 n. 24. However, the point is that it is the substantive effect of the activity on the waters that is important, not what one calls the piece of equipment used. In any case, an agency interpreting its own regulations is entitled to *Chevron* deference unless the interpretation is clearly unreasonable. As the *Barnhart* Court stated, the agency interpretation is permissible "because it makes considerable sense in terms of the statute's basic objectives." 122 S.Ct. at 1270.

B. The Conversion of Wetlands to Drylands Is Subject to the "Recapture" Provision of Section 404(f)(2).

If there was any doubt that Congress did not intend a blanket exemption for "plowing," the section 404(f)(2) recapture provision resolves it. Section 404(f)(2) provides:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. §1344(f)(2).

It is undisputed that Petitioners' deep-ripping resulted in the conversion of wetlands to drylands. The Ninth Circuit held:

> We conclude that the deep-ripping at issue in this case is governed by the recapture provision. Converting ranchland to orchards and vineyards is clearly bringing the land "into a use which it was not previously subject," and there is a clear basis to conclude that the destruction of the soil layer at issue here constitutes an impairment of the flow of nearby navigable waters.

Borden II, 261 F.3d at 815.

Petitioners, however, argue that the recapture provision "does not address a change from one agricultural crop to another, like the change here from pasture and forage crop to orchard/vineyard crop." Pet. Br. at 33. If all that was involved here was "a change from one agricultural crop to another," Petitioners might have a point. However, a good deal more than that occurred here: a ranch was subdivided for development; rangeland was converted to orchards and vineyards; and wetlands and streams were

converted to drylands. Virtually every court to consider the question has held that such changes in land use and hydrology are subject to the recapture provision. *Akers*, 785 F.2d at 822-23 (wetland crops to dryland farming); *Avoyelles*, 715 F.2d at 925 (bottomland forestry to soybean production); *Huebner*, 752 F.2d at 1240 (cranberries to barley and other dryland crops); *Larkins*, 852 F.2d at 192 (conversion of forested wetlands to dryland crop production); *United States v. Cumberland Farms of Conn.*, 647 F.Supp.166, 176, *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 108 S.Ct. 1016 (1988) (conversion of wetland to dryland crop production); *Bayou Marcus Livestock v. USEPA*, 20 Envt'l L. Rep. 20445, 20446 (N.D. Fla. 1989) (conversion of forested swamp to dryland tree farm).

In the face of this overwhelming body of caselaw, Petitioners cite a Bankruptcy Court decision, *In Re Carsten*, 211 B.R. 719, 735-36 (Bkrtcy. D. Mt. 1997), which stated, in dicta,[15] that the recapture provision was only meant to apply to the conversion of wetlands "on a significant scale," not to minor conversions of small areas of marginal waters to uplands. This view of section 404(f) is directly contradicted by the words of its author, Senator Muskie, who said the farming exemption is meant to apply to "narrowly defined activities that cause little or no adverse effects either individually or *cumulatively*." (Emphasis added). The history of wetland destruction in this country is that they have been lost an acre at a time, not all at once. Congress included the recapture provision

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[15] The holding in the case was: "Thus, the dredging did not impair the flow or circulation of the waters of the slough, or reduce the reach of the waters. Consequently, the first prong of the recapture provisions does not apply, and their application is precluded." 211 B.R. at 235. Here, by contrast, the deep-ripping did alter the flow, circulation and reach of the waters.

to make sure the farming exemption did not lead to the further incremental destruction of wetlands, an acre at a time.

C. The Agencies' Interpretation Limiting the Section 404(f) Exemption to Established Farming Practices That Do Not Convert Wetlands to Drylands Is Entitled to *Chevron* Deference.

Congress has spoken directly to the scope of section 404(f) and made it plain that it is to be applied narrowly. Thus under the "first prong" of *Chevron*, the Court must enforce the will of Congress. *Chevron*, 467 U.S. at 854. However, even if there was some ambiguity in the scope of the farming exemption, the agencies' consistent interpretation that the farming exemption be narrowly confined to circumstances where there is only minor impact on aquatic resources and no outright conversion of wetlands to drylands, is entitled to deference under *Chevron* step two. *Id.*

As mentioned, Congress vested the EPA and the Corps with broad rulemaking authority under 33 U.S.C. §1361. With respect to the scope and effect of the 404(f) exemption, the agencies have exercised that authority in a consistent and reasonable fashion, which the lower courts have consistently upheld.

Petitioners attempt to discredit the Joint Memorandum to the Field Regarding the Applicability of Exemptions under section 404(f) to Deep-Ripping Activities in Wetlands. Dec. 12, 1996 (re-issued as Regulatory Guidance Letter (RGL) No. 96-02) (*Field Memo*) Pet. Br., at 43-44. While it may be true that this guidance was issued in response to the Borden Ranch situation, that does not make it any less persuasive or entitled to less respect. *Barnhart*, 112 S.Ct. at 1270. This guidance is based on the

agencies' long-standing position, embodied in every regulation and guidance issued under section 404(f), that plowing in wetlands is exempt from regulation only where three conditions are met: (1) it is conducted as part of an ongoing, established agricultural, silvicultural or ranching operation; (2) the activity is consistent with the definition of plowing in EPA and Corps regulations; and (3) the plowing is not incidental to an activity that results in the immediate or gradual conversion of wetlands to non-waters. *Field Memo*, at 3. Contrary to Petitioners' assertion, this guidance does not represent a reversal of the agencies' previous position on plowing. Pet. Br., at 44. Petitioners selectively cite this passage from an earlier guidance document:

> Plowing for the purpose of producing food, fiber, and forest products and meeting the definition in Section 323.4 will never involve a discharge of dredge or fill material. Such plowing is not subject to any of the provisions of Section 404 including the Section 404(f) exemption limitations. Section 404(f) is applicable to those activities that do involve a discharge but are statutorily exempted from the need to obtain a 404 permit.

See RGL No. 86-01 (February 11, 1986).

What Petitioners neglected to include is this later passage from the same guidance document:

> Not all activities involving the use of a plow, disc, or similar equipment will satisfy the definition of plowing. For example, using a plow to dry the surface of a peat bog to facilitate mining is not plowing since it is not for the purpose of producing food, fiber or forest products. Also, the use of a plow to divert a braided stream feeding a wetland is not plowing *because the purpose is to change a water of the United States to dry land.*

> Thus these activities are regulated under section 404 if they occur in a water of the United States.

Id. at ¶ 4 (emphasis added).

In sum, the agencies have always taken the position that it is the *purpose* of the activity, not what those seeking the exemption choose to call it, that determines whether an activity is exempt. This longstanding interpretation is entitled to respect. *North Haven Bd. of Ed. v. Bell,* 456 U.S. 512, 522 n. 12 (1982). Where the activity converts "waters of the U.S." to non-waters, the exemption cannot apply. Any other reading of the statute would nullify Congressional intent.

CONCLUSION

For the foregoing reasons, amicus urges the Court to affirm the judgment of the Court of Appeals.

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In the

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP; ANGELO K. TSAKOPOULOS,
Petitioners,
v.

UNITED STATES ARMY CORPS OF ENGINEERS, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF THE AMICI CURIAE

Pursuant to the Clean Water Act, the amici States have established water quality standards and goals for State waters, and have the primary right and responsibility to prevent, reduce, and eliminate water pollution. Amici States also have the right, but not the obligation, to conduct the permitting programs required by the Act in the place of the federal authorities. Consistent with the allocation of federal and State responsibilities set forth in the Act, the amici States cooperate with federal authorities in implementing a comprehensive program to eliminate water pollution and to improve surface and ground water quality. This comprehensive program includes the regulation of discharges into wetlands, which are considered waters of the United States under Section 404 of the Act, in recognition of the key water quality functions that wetland resources serve.

Petitioners argue that "deep ripping," which involves the movement of earth, rock, and sand horizontally and vertically in wetlands by dragging long metal shanks attached to a plow, and which has the effect of turning those wetlands into uplands, can occur without regulation under Section 404, because "deep ripping" does not involve a discharge of dredged and fill material into a water of the United States. Petitioners also argue that if "deep ripping" without a permit violates the Act, where many instances of "deep ripping" occur on a single day, only one violation occurs for penalty assessment purposes. Petitioners' cramped interpretation of what constitutes a discharge under Section 404, and how Section 404 can be enforced, could permit wetlands to be filled and destroyed without oversight, thereby eliminating waters of the United States that are critical to the maintenance of water quality.

Amici oppose an interpretation of Section 404 which would allow wetlands to be destroyed through "deep-ripping" without regulation, simply because the fill used to create the upland is a component of the soil beneath the wetlands. Interpreting Section 404 in this restrictive fashion

will facilitate the destruction of waters of the United States, undermine the efforts of the amici States to restore and maintain the quality of local waters, and upset the allocation of federal and State responsibilities established by Congress to restore and maintain the Nation's waters. Accordingly, amici urge this Court to hold that a permit is required under Section 404 if "deep ripping" or other soil movement conducted in wetlands converts the wetlands to an upland. Amici also urge the Court to affirm that there is discretion under the Act to consider each unpermitted discharge into wetlands as a separate violation for penalty assessment purposes.

SUMMARY OF ARGUMENT

The Clean Water Act was adopted to establish an all-encompassing program of water pollution control, and to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. §1251(a); *City of Milwaukee v. Illinois*, 451 U.S. 304, 318-19 (1981). The Nation's waters include wetlands, which filter and purify water draining into adjacent bodies of water and serve important biological functions. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985). Accordingly, the Act provides that a permit from the United States Army Corps of Engineers is required before fill material can be discharged into wetlands. 33 U.S.C. §1344.

Petitioners argue that "deep ripping," an activity which can convert a wetland to an upland by using soils from in, beneath, and around the wetland, is not subject to regulation under Section 404 because the practice does not involve the "discharge" of a pollutant from a "point source." Interpreting these terms in this overly technical fashion would undermine Congress' determination in the Act to establish a broad program of water pollution prevention, and would facilitate the destruction of waters of the United States that are critically needed to maintain water quality.

Although regulation of land uses is viewed as primarily a local matter, regulation of water pollution and the need to restore and maintain the Nation's waters has been recognized by Congress as a matter of national concern. Accordingly, in the Act, Congress mandated that the federal authorities fulfill certain responsibilities, which include the permitting of discharges of fill material into waters of the United States pursuant to Section 404 of the Act. Section 404 allows, but does not require, States to assume that permitting jurisdiction from the federal authorities. 33 U.S.C. §1344(g). Thus, restricting the ability of the federal authorities to regulate wetlands under Section 404 may impose on States an

obligation which Congress did not require the States to assume, and will upset the division of federal and State responsibilities contained in the Act.

In order effectively to protect the quality of local waters, States depend on the federal authorities to establish and implement the permitting programs required by the Act to regulate discharges into waters of the United States, including wetlands. Reducing federal regulation of discharges into wetlands, and thereby facilitating the destruction of wetlands, is likely to adversely affect water quality, thereby removing a safety net upon which States depend to fulfill their responsibilities under the Act. Limiting federal authority to regulate the destruction of wetlands will require States concerned about water quality and wetlands protection to assume the responsibilities now performed by the federal government, disrupting the existing balance between State and federal authority.

In addition, this Court should affirm that each unpermitted discharge of dredged and fill material into wetlands may be considered a separate violation of the Act for penalty assessment purposes. A contrary interpretation of the Act's penalty provisions would conflict with its plain language, and could provide an economic disincentive to comply with statutory requirements, thereby undermining the Act's goal: the restoration and maintenance of the Nation's waters.

ARGUMENT

RESTRICTING THE SCOPE OF ACTIVITIES THAT REQUIRE A PERMIT UNDER SECTION 404 OF THE CLEAN WATER ACT, AND THE REACH OF THE PENALTY PROVISIONS OF THAT STATUTE WILL UNDERMINE STATE EFFORTS TO ENHANCE WATER QUALITY AND WILL UPSET THE BALANCE OF STATE AND FEDERAL RESPONSIBILITIES SET BY CONGRESS.

The Clean Water Act established a comprehensive program of water pollution regulation, reflecting Congress' recognition that the prior program had been "inadequate in every vital respect." *City of Milwaukee v. Illinois*, 451 U.S. 304, 310 (1981). The Act provided a new regulatory system, based on the principle that pollutants should not be discharged into the Nation's waters except pursuant to a permit. *Id.* To achieve its comprehensive, long-range goals, the Act prohibits any unpermitted discharge from a point source, and broadly defines a "point source" to include any discernible, confined and discrete conveyance from which pollutants are or may be discharged. *Id.* at 318. Similarly, the Act broadly defines pollution as any man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water. 33 U.S.C. §1362(19); *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 719 (1994).

To meet the ambitious goal of restoring and maintaining the chemical, physical and biological integrity of the Nation's waters, the Act requires a national program to eliminate

water pollution, and anticipates a partnership and a division of responsibility between the States and Federal Governments. 33 U.S.C. §1252; 33 U.S.C. §1254; *PUD*, 511 U.S. at 704; *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Thus, the Act recognizes that the States have the primary responsibility and right to reduce and eliminate water pollution, but does not require any State to regulate discharges into waters within its boundaries. Rather, the Act obligates the federal authorities to regulate discharges into waters of the United States, and allows States the option of either relying on federal enforcement authority or undertaking that function, provided that the State's regulatory program satisfies federal requirements. *Id.* at 102. Reliance on federal authority is of particular importance with respect to interstate migration of waters. If a discharge in one State will adversely affect the waters of a downstream State, the downstream State cannot block the discharge, but must seek relief from the federal authorities. *Id.* at 100. Thus, without federal participation, no State can ensure comprehensive protection of the quality of its waters.

Waters of the United States include freshwater wetlands, which enhance and protect water quality by filtering and purifying water draining into surface and groundwaters. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985). Hence, the prohibition against unpermitted discharges contained in the Act properly applies to discharges of dredged and fill material into wetlands. *Id.;* 33 U.S.C. §1344. The Act assigns the responsibility for permitting these discharges to the Army Corps of Engineers, giving States the option, but not the obligation, to assume that federal function. 33 U.S.C. §1344(g). To date, only two States, New Jersey and Michigan, have assumed this federal obligation. However, other States ensure the protection of wetlands through Section 401 of the Act. That Section allows a State to object to the issuance of a federal permit, if the activities proposed to be permitted would be inconsistent

with the State's water quality standards and goals. *PUD*, 511 U.S. at 722-23.

Petitioners' argument that "deep ripping" within a wetland cannot constitute a discharge of fill material or a pollutant into a water of the United States elevates form over substance, and will permit the destruction of waters of the United States. The purpose of Section 404 is to protect waters of the United States such as wetlands by regulating their filling with dredged material, because this activity can eliminate the wetland and prevent it from serving key water quality and other functions. "Deep ripping" eliminates wetlands, by combining the soils in, beneath and around an existing wetland into a new soil composite which is then deposited into the wetland as a means of converting it to an upland. Once the wetland is converted to an upland, it may in the future be used for any purpose, whether exempt from Section 404 or not.

Clearly, an activity which causes the destruction of a water of the United States constitutes the sort of discharge that Section 404 was intended to address. The end result of "deep ripping" is the destruction of wetlands, an essential element of the Nation's waters and water protection system. Surely, Congress intended to subject this activity to federal regulatory authority, regardless of whether the material used to eliminate the wetlands is transported from another location or is ripped from the soil beneath the wetlands. The origin of the fill material cannot form a principled legal basis to distinguish "deep ripping" from other fill activity.

In addition, a holding that "deep ripping" is not subject to Section 404 will be detrimental to State efforts to promote water quality and may require States to assume an obligation that Congress intended to be fulfilled by the federal government, absent voluntary State assumption of that responsibility. The Act identifies States as the entities that are principally responsible for the maintenance of water

quality within their boundaries, and requires them to adopt water quality standards. *PUD*, 511 U.S. at 704. The Act, however, does not assign permitting authority over discharges to the States. Rather, the Act imposes that obligation on the federal government, and allows States to object to proposed federal permitting that would violate Sate water quality standards under Section 401. 33 U.S.C. §1341. This allocation of federal and State responsibilities was selected by Congress as the best way to achieve the comprehensive goals of the Act and is a basic component of the Act's regulatory scheme.

Adoption of petitioners' tortured interpretation of "discharge," "fill," and "pollutant" in the Act could jeopardize State efforts to control water pollution through State statutes which use identical or similar terms. While this Court's interpretation of those phrases as they appear in the Act will not mandate that those phrases be interpreted in the same way in State statutes, the Court's holding will certainly make a more expansive interpretation under State law more difficult to achieve. In addition, treating any category of discharges into wetlands as a local concern that can only be addressed on a State-by-State basis would contravene Congress' determination to impose minimum national standards to prevent water pollution. So long as wetlands are waters of the United States, the Act requires their protection to be subject to national permitting standards which the States may supplement. This Court should, therefore, affirm the Ninth Circuit's decision that "deep ripping" constitutes a discharge into wetlands subject to permitting under Section 404.

In addition to arguing that "deep ripping" is not a discharge of a pollutant under Section 404, petitioners also argue that the Act does not permit each instance of "deep ripping" to be treated as a separate violation for penalty assessment purposes. Adoption of petitioners' view on this issue would conflict with the plain language of the statute,

and undermine the comprehensive, all encompassing goals of the Act.

The Clean Water Act provides the federal authorities with a variety of enforcement options, including the ability to assess civil penalties of up to $25,000 per day for each violation of the Act. 33 U.S.C. §1319(d). This clearly is not a cap on the maximum daily penalty that can be imposed, but only is a cap on the daily penalty for any individual violation that occurs on a given day. The courts have consistently held that where a person commits more than one violation on a single day, a penalty exceeding $25,000 can be imposed for that day's violations. See, e.g, *United States v. Smithfield Foods, Inc.*, 191 F. 3d 516, 528 (4th Cir. 1999), cert. den., 531 U.S. 813 (2000); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F. 2d 1128, 1137-39 (11h Cir. 1990). In addition, the courts have held that where a discharge limitation is measured in more than a single day's period of time, a separate violation occurs on each day involved in the time period covered by the limitation. *United States v. Aluminum Co. of America*, 824 F. Supp. 640 (E.D. Tex. 1993)(violations of daily average limitations were violations for every day of the month); *Public Interest Research Group v. Star Enterprise*, 771 F. Supp. 655 (D.N.J. 1991)(violation of monthly average limitation constituted a violation for each day of the month); *United States v. Amoco Oil Co.*, 580 F. Supp. 1042 (W.D. Mo. 1984).

Congress' decision to allow a penalty of up to $25,000 per day for each separate violation is consistent with its determination to attack the problem of water pollution and the need to restore and maintain the Nation's waters in a broad, all-encompassing fashion. Moreover, allowing penalties to be assessed in this fashion permits a penalty to reflect more accurately the severity of the infractions, thereby serving as an effective deterrent. A person who commits multiple violations of a single requirement on a

single day should not be subject to the same penalty cap as a person who commits a single violation on a single day, as the former conduct likely will cause greater harm. Further, imposing the penalty cap urged by petitioners could provide an economic incentive for persons desiring to fill illegally waters of the United States to marshal sufficient resources to complete in a single day filling that would normally require multiple days to complete, thus reducing the anticipated penalty to an economically acceptable expense of converting wetlands to uplands.

The penalty provisions of the Act should be interpreted to avoid this result and to encourage maximum compliance with the Act, as a means of fostering the restoration and maintenance of the nation's waters mandated by Congress. Accordingly, the decision of the Ninth Circuit should be affirmed.

CONCLUSION

For these reasons, amici States urge this Court to affirm the decision of the Ninth Circuit.

Respectfully submitted,

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In The
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PROTECTION AGENCY,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL WILDLIFE FEDERATION, SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, AND NATIONAL AUDUBON SOCIETY IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

National Wildlife Federation, Sierra Club, Natural Resources Defense Council, and National Audubon Society all have a long history of involvement in, and expertise concerning, the protection of our Nation's waters and the implementation of the Clean Water Act. Through testimony in Congress, comments and other advocacy in the Executive Branch, and litigation in the courts, they have pursued these interests repeatedly during the three decades since enactment of the seminal 1972 amendments that gave the Act its current structure. All of these organizations have members who use and rely on a wide array of waters throughout our Nation for recreation, scientific study, and protection of their health, safety, property, drinking water, and food supply.[1]

STATEMENT OF THE CASE

Introductory Statement

The arguments made by petitioners and their *amici* pose a profound danger to the future of the Clean Water Act and the precious waters it protects. Those arguments seek nothing less than the power to destroy outright and to severely degrade waters – not "isolated" ponds like those at issue in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), but "waters of the United States" that are

---

[1] Pursuant to S. Ct. R. 37.3(a) and 37.6, the undersigned represents that (1) all parties consented to the filing of this brief, (2) no counsel for any party authored this brief in whole or in part, and (3) no person or entity other than the above-named *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

undisputedly within the jurisdiction of the Act's permit program. *See* § 502(7), 33 U.S.C. § 1362(7).

Petitioners' arguments threaten to reach well beyond the circumstances of this case in at least two respects. First, the **geographic** scope of those arguments is extremely broad, addressing cross-cutting statutory terms like "discharge," "point source," "pollutant," and "addition," § 502, 33 U.S.C. § 1362, and the exemptions in § 404(f)(1), 33 U.S.C. § 1344(f)(1) – each of which applies, not simply to certain subsets of "waters of the United States," but to **all** of them. Thus, petitioners' arguments, if accepted, threaten destruction of and damage to not only intermittent swales and streams like those located on Borden Ranch, but also perennial streams, rivers, lakes, coastal bays and estuaries – as well as wetlands adjoining them.

Second, the **activities** potentially exempted by those arguments are likewise wide-ranging. The key statutory terms "discharge," "point source," "pollutant," and "addition" do not apply solely to agricultural activities, but also to all other activities regulated by the Act's permit programs – including the § 404 program administered by the Corps as well as the § 402 program administered by the Environmental Protection Agency. 33 U.S.C. §§ 1344, 1342. Thus, petitioners' arguments raise the specter of wholesale destruction of waters through mining, development of shopping malls and subdivisions, channelization, roadbuilding and other infrastructure projects – a prospect underscored by the presence in this case of *amici* from many of those industries.

Even considering only agriculture, petitioners' arguments are troubling enough. Petitioners untenably claim that the Act's agricultural provisions allow unpermitted destruction of United States waters by conversion to dry land – here, from ranched wetlands to upland crops. This

approach would allow wholesale conversions of wetlands without a permit – an alarming prospect, given that the conversion of wetlands to cropland has been the primary source of wetland loss in the United States. U.S. Fish and Wildlife Service, "Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States, 1950's to 1970's" (1983) ("1983 Wetland Trends Report") at 3, 26; U.S. Fish and Wildlife Service, "Status and Trends of Wetlands in the Conterminous United States, 1986 to 1987" (2000) ("2000 Wetland Trends Report"), at 29. Indeed, under petitioners' theory, even **developers** could escape regulation by first converting wetlands to upland crops (so they are no longer regulated waters of the United States), then developing them for nonagricultural uses.

An interpretation of the Act authorizing unpermitted wholesale destruction and degradation of rivers, streams, bays, estuaries, lakes, and their adjacent wetlands would turn on its head Congress's intent that the Act serve as a "comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132 (1985) (quoting CWA § 101(a), 33 U.S.C. § 1251(a)). "Integrity" means "a condition in which the natural structure and function of ecosystems is **maintained**," *id.* (emphasis added; internal quotations omitted) (quoting legislative history) – not destroyed. With half of our wetlands already lost, and tens of thousands of acres more being lost each year, 2000 Wetland Trends Report at 9, and with our streams and rivers under constant assault from channelization, mining, and other damaging activities, Corps of Engineers, Draft Nationwide Permits Programmatic Environmental Impact Statement (July 2001), at App. F, the need for the Act's protection remains urgent indeed.

The Act's substantive provisions, far from supporting petitioners' attempt to undermine the statutory purposes under the guise of interpretation, conclusively refute that attempt. In keeping with Congress's recognition that "[p]rotection of aquatic ecosystems . . . demanded broad federal authority to control pollution," *Riverside Bayview*, 474 U.S. at 132-33, the 1972 Act enacted a comprehensive ban on unpermitted point source discharges, using broad definitions that plainly encompass the facts of this case. Far from undermining the broad reach of those definitions, the 1977 amendments expressly **confirmed** their applicability to agriculture.

The Clean Water Act

1972 Act. At the core of the Act since 1972 has been a basic prohibition: "the discharge of **any** pollutant by **any** person shall be unlawful" except as provided in enumerated sections of the Act. § 301(a), 33 U.S.C. § 1311(a) (emphasis added). To emphasize the wide scope of this prohibition, Congress included several key definitions in the Act. For example,

> • "discharge of a pollutant" is defined as *inter alia* "**any** addition of **any** pollutant to navigable waters from **any** point source," § 502(12), 33 U.S.C. § 1362(12) (emphasis added);
>
> • "pollutant" is defined to include *inter alia* "dredged spoil," "rock," "sand," "cellar dirt," and "biological materials," § 502(6); and
>
> • "point source" is defined as "**any** discernible, confined and discrete conveyance, including but not limited to **any** pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged," § 502(14) (emphasis added).

The Act offers two primary paths for seeking a waiver of § 301(a)'s broad prohibition on discharge. For most discharges, a permit may be sought from EPA pursuant to § 402, 33 U.S.C. § 1342. In the case of "the discharge of dredged or fill material," however, Congress assigned permitting authority to the Corps of Engineers. § 404(a), 33 U.S.C. § 1344(a).

1977 Amendments. Stressing the urgent need for protection of wetlands,[2] Congress in 1977 rejected attempts to limit the scope of waters covered by the Act. *Riverside Bayview*, 474 U.S. at 136-37. Instead, Congress enacted narrowly drawn – and conditional – exemptions targeted at specific activities. In particular, Congress provided that, with specified exceptions, no permit under either § 404 or § 402 would be required for (*inter alia*) the discharge of dredged or fill material "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices." § 404(f)(1)(A). The drafters cautioned that "[t]he exemption for minor drainage does **not** apply to the drainage of swampland or other

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[2] *See, e.g.*, Cong. Research Service, A Legislative History of the Clean Water Act of 1977 (Oct. 1978) ("1977 Legis. Hist."), at 644 (Senate Report: "The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas," and "[t]here is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage."). *Accord*, *id.* 923 (Sen. Baker), 916-19 (Sen. Chafee); 882 (Sen. Stafford); 869-70 (Sen. Muskie); 549 (Sen. Moynihan); 908-09 (Sen. Hart); 417-18 (Cong. Dingell); 413 (Cong. Lehman).

wetlands." 1977 Legis. Hist. at 709 (Senate Report) (emphasis added).

The activities enumerated in § 404(f)(1) were not completely exempted from the permit requirement. First, the exemption does not relieve dischargers of the obligation to obtain a permit for releases of toxic pollutants covered by Clean Water Act § 307, 33 U.S.C. § 1317. § 404(f)(1) (the enumerated discharges are not regulated under §§ 404, 402, or 301(a) "**except** for effluent standards or prohibitions under section 1317 of this title") (emphasis added).

Second, **[a]ny** discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, **shall be required to have a permit under this section**." § 404(f)(2) (emphasis added).

In short, Congress's intent was to exempt only "those narrowly defined activities that cause little or no adverse effects either individually or cumulatively." 1977 Legis. Hist. at 474 (Sen. Muskie). *Accord*, *id.* 420 (Cong. Harsha), 529 (Sen. Wallop).

Borden Ranch

In this case, petitioners used heavy earthmoving equipment on a California ranch to destroy some United States waters and seriously impair others. At issue are swales, "sloped wetlands that allow for the movement of aquatic plant and animal life, and that filter water flows and minimize erosion," and intermittent drainages, "streams that transport water during and after rains." Pet. App. 2 (Ninth Circuit). Water from the swales flowed

through the intermittent streams to Goose Creek and Dry Creek, and then to the Cosumnes and Mokelumne Rivers. District Court findings, Pet. App. 68-69, 86-92; Dec. of Dr. Lyndon C. Lee, Supplemental Excerpts of Record ("SER") 126-27. These swales and streams all "depend upon a dense layer of soil, called a 'restrictive layer' or 'clay pan,' which prevents surface water from penetrating deeply into the soil." Pet. App. 2 (Ninth Circuit).

Petitioners used at least two kinds of rolling stock – bulldozers and tractors equipped with prongs, discs, and rollers, *see* Pet. App. 9, SER 129 – to destroy and impair these waters. These devices –

> • Pushed dirt into the swales and streams from surrounding upland areas. *See*, *e.g.*, District Court findings, Pet. App. 83 (Corps official found that "[s]oil was moved **into** a number of these drainages by turning equipment") (emphasis added), 89 ("The upper swale portions have been partially filled due to deep rippers plowing **to the edge of the feature** and depositing soil **into** the swale.") (emphasis added); *id.* (in another swale, "due to proximate deep ripping, a small amount of fill material has been deposited"); 87, 90, 92 (ripping moved "through" or "across" various swales and streams, indicating that soil was dragged perpendicularly into them from outside); Lee Dec., SER 129 (expert whom the district court found to be the "most thorough" [Pet. App. 86] found that "[t]he bulldozers and tractors and attached rippers, discs, and rollers carry and drag along large clods of dirt and biological material such as plant stems and roots from surrounding **upland** areas **into** the . . . swales . . . and intermittent streams") (emphasis added).
>
> • Broke up the subsurface hardpan layer, thereby depriving the swales and streams of

their capacity to hold water – i.e., **draining** them. Pet. App. 8 (Ninth Circuit: "by ripping up the bottom layer of soil, the water that was trapped can now **drain** out") (emphasis added).

• Excavated soil from within the swales and streams and dragged it laterally to a new location. *Id.* 3, 8 ("soil . . . is . . . dragged behind the ripper," and was "wrenched up, **moved around**, and redeposited **somewhere else**") (emphasis added); District Court findings, Pet. App. 70 (deep ripping "**mov[ed]** earth, rock, sand, and biological matter both **horizontally** and vertically") (emphasis added). *Accord*, Lee Dec., SER 128-129.

• Deposited soil in 28 swales and streams, Pet. App. 86 (district court), filling many of them completely and many others partially. *Id.* 86-88, 91-92.

• Converted areas of United States waters to dry land by "completely obliterat[ing]" at least eight of the swales and streams, and "nearly completely obliterat[ing]" or otherwise damaging others. Pet. App. 106, 86-92 (district court). *See also* Lee Dec., SER 128-29, 132; Pet. App. 10 (Ninth Circuit: petitioners' activities "radically altered the hydrological regime of the protected wetlands").

SUMMARY OF ARGUMENT

The plain meaning of the Act compels the conclusion that petitioners' activities fall within the Act's permit program, whose applicability is defined by broad statutory definitions – without any exemptions for agricultural activities of the kind at issue here. The wheeled earthmoving equipment used by petitioners constitutes "point sources," which are statutorily defined to include "any . . . rolling stock," and more broadly "any discernible, confined

and discrete conveyance." The earth discharged contains several components statutorily defined as "pollutants," including "rock," "sand," "cellar dirt," and "biological materials" – and also constitutes "dredged material" and "fill material."

Petitioners' activities encompass the "discharge" – *i.e.*, "addition" – of pollutants to United States waters. First, petitioners moved earth into those waters from uplands. Second, they excavated earth within United States waters, moved it around, and redeposited it at other locations within those waters. Given that "dredged material" inherently is material excavated **from United States waters**, the "addition" requirement is plainly met by such redeposits.

Section 404's agricultural exemption, which applies only to activities whose environmental effects are minor individually and cumulatively, such as "**minor** drainage," excludes the conversion of ranched wetlands to farmed uplands.

ARGUMENT

Petitioners argue that agriculture is exempt from point source regulation generally, and alternatively, that the earthmoving activities at issue are exempt from the Act's permit requirements because they allegedly fall outside various key statutory definitions ("point source," "pollutant," and "discharge"), and are within the scope of the § 404(f) exemption enacted by Congress in 1977. Each of these arguments is refuted by the plain meaning of the Act.

I. CONGRESS ENACTED NO BLANKET AGRICULTURAL EXCLUSION FROM POINT SOURCE PERMIT REQUIREMENTS.

Petitioners argue broadly that "Congress intentionally excluded agriculture from Section 404 regulation." Pet. Br.

27 (initial caps omitted). To the contrary, as discussed in Parts II-IV below, the 1972 Act enacted broad definitions that on their face **include** agricultural point sources. Indeed, Congress repeatedly prefaced these key provisions with the word "any," *see* pp. 4-5, *supra* (quoting Act), thereby emphasizing their comprehensive scope. *See, e.g.*, *Dept. of HUD v. Rucker*, 122 S. Ct. 1230, 1233 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind' ").

Far from inviting implicit exclusions from these definitions, the drafters expressly emphasized their importance, and cautioned against attempts to narrow them. *See, e.g.*, Cong. Research Service, A Legislative History of the Water Pollution Control Act Amendments of 1972 (Jan. 1973) ("1972 Legis. Hist."), at 762 (House Report: "[C]ertain terms used in the drafting of this section [i.e., § 2, which contained §§ 301 and 404] have **very specific and technical meanings**. The definitions of these terms are included in section 502 of title V, and it is recommended that very special attention be accorded section 502.") (emphasis added); 356 (Cong. Blatnik, committee chair: "If there is a part of this bill that can be labeled 'most important,' it is these definitions. **To revise them in a way to limit their coverage is to severely detract from the effectiveness of the bill**.") (emphasis added). *See also id.* 651-53 (**rejecting** proposed amendment seeking to exempt agricultural irrigation from point source regulation).

Indeed, discussing its 1975 regulations that had established some agricultural exemptions, the Corps in 1977 cautioned that "many interpreted this language as an exclusion of all practices by the farming and forestry industry including those that **do** involve discharges of dredged or fill material into water. **The FWPCA does not allow us to make such an exemption or exclusion for**

any industry." 42 Fed. Reg. 37130 (July 19, 1977) (emphasis added).

Subsequently, Congress carefully calibrated the applicability of the Act's permit requirements to agriculture, enacting in 1977 a provision – § 404(f) – that addressed the issue in detail. Petitioners untenably claim that § 404(f) represents a "belt and suspenders" approach to clarifying the **exclusion** of plowing and other normal farming activities from § 404 regulation. Pet. Br. 37-38. To the contrary, Congress knew full well how to carve out exclusions from the Act's key definitions governing the applicability of the point source discharge program – and indeed the 1977 Amendments that enacted § 404(f) included such a provision. Pub. L. 95-217, § 33(b), 91 Stat. 1577 (Dec. 27, 1977) (amending the "point source" definition in § 502(14) to exclude irrigation return flows).[3] Section 404(f) carves out no such exclusion for plowing or other agricultural earthmoving activities.

To the contrary, § 404(f) expressly references "the **discharge of dredged or fill material** . . . from normal farming, silviculture, and ranching activities such as **plowing**," § 404(f)(1)(A) (emphasis added), thus confirming Congress's understanding that plowing and other agricultural activities can produce discharges. Moreover, while § 404(f) includes **limited** exemptions for such agricultural discharges, it also expressly provides – in each of its two subparagraphs – that discharges associated with **all** of the listed activities, including plowing, **are**

[3] *See also* §§ 502(14) (additional amendment, enacted in 1987, excluded agricultural stormwater from definition of "point source"), 502(6) (certain military and oil-and-gas activities excluded from definition of "pollutant"), 502(12)(B) (ocean vessels excluded from definition of "discharge of a pollutant").

subject to permit requirements in specified circumstances. *See* pp. 5-6, *supra*. Considering this amendment, the D.C. Circuit, in a decision praised by petitioners (at 22) as "persuasive," expressly indicated that "**plowing** . . . may . . . produce actual discharges, i.e., **additions** of pollutants." *Natl. Mining Assn. v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1405 (D.C. Cir. 1998) (emphasis added).

II. THE ROLLING STOCK USED BY PETITIONERS ARE "POINT SOURCES."

The wheeled equipment at issue here plainly constitutes point sources under the Act. The statutory definition expressly encompasses "any . . . rolling stock." § 502(14). Petitioners creatively attempt to equate bulldozers and tractors with draft animals such as "horses and oxen," Pet. Br. 26, but of course the latter walk on hooves, while the former **roll** on wheels.

While the express statutory reference to "rolling stock" suffices to resolve the matter, the earthmoving equipment at issue here also fits comfortably within the broader statutory phrase "any discernible, confined and discrete conveyance" – indeed, the record documents, and petitioner does not dispute (Pet. Br. 21), that the equipment conveyed earth both vertically and laterally. *See* pp. 7-8, *supra*. Reinforcing the clear import of the statutory text, the legislative history cautions that agency implementation "should not ignore discharges resulting from point sources **other than** pipelines or similar conduits. . . . There are many other forms of periodic, though frequent, discharges of pollutants into the water through point sources such as barges, vessels, feedlots, **trucks and other conveyances**." 1972 Legis. Hist. at 1469 (Senate Report) (emphasis added).

That earthmoving equipment constitutes point sources is further confirmed by § 404(f), which enumerates various activities (including plowing as well as the construction and maintenance of infrastructure including ditches, roads, and sedimentation basins) that are expressly subjected to point source permitting requirements in specified circumstances. *See* pp. 5-6, *supra* (quoting § 404(f)(1) and (2)). Because most of the enumerated activities are conducted with earthmoving equipment, § 404(f)'s language expressly applying point source permitting requirements to those activities further confirms that such equipment constitutes point sources.

The Fifth Circuit long ago held that "bulldozers" equipped with "blades" constitute point sources, and petitioners do not claim that case was wrongly decided. Pet. Br. 26 and n.16 (discussing *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983)). There is no basis in § 502(14) for distinguishing between that equipment and the bulldozers and tractors at issue here, which were likewise equipped with metal earthmoving attachments, and which used those attachments to excavate, move and relocate, and grade soil. *Cf.* Pet. Br. 26 (erroneously asserting that the Borden Ranch equipment did not excavate or grade).

Petitioners' suggestion (at 26) that the activities at issue here are not "major" enough to constitute point source discharges ignores the district court's express findings that those activities destroyed numerous United States waters and damaged others. *See* pp. 7-8, *supra*. Moreover, the Act's point source program does not apply only to "major" discharges. *See, e.g., Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617, 626-27 (8th Cir. 1979). To the contrary, the Act expressly requires regulation of discharges that are "incidental," § 404(f)(2) – *i.e.*, an "unpredictable or **minor** accompaniment," or "[o]f a

minor, casual, or subordinate nature." Am. Heritage Dict. (4th ed. 2000) (emphasis added). Activities whose impacts (unlike those here) are truly "minimal" may qualify for a **general** permit, § 404(e), but not for outright exemption from **any** permit.

Petitioners further argue (at 25 n.14) that the earthmoving equipment is not covered because the word "plow" does not appear in § 502(14). First, § 502(14) uses the broad phrases "**any** . . . rolling stock" and "**any** discernible, confined and discrete conveyance" (emphasis added), with no suggestion that only certain **kinds** of rolling stock and conveyances are covered. *See* p. 10, *supra* (citing caselaw on use of word "any"). Second, Congress clearly knew how to carve out exemptions from the point source definition, having done so in two separate amendments – in 1977 for "return flows from irrigated agriculture" and in 1987 for "agricultural stormwater discharges." § 502(14). Under basic principles of statutory interpretation, the existence of those exemptions undercuts rather than supports petitioners' efforts to imply additional exemptions for the earthmoving equipment at issue here. *TRW v. Andrews*, 122 S. Ct. 441, 447 (2001). *Cf.* Pet. Br. 26 (erroneously arguing the contrary). Third, even if the equipment at issue could be considered "plows," § 404(f) expressly confirms the applicability of the Act's point source provisions to "plowing." *See* pp. 5-6, 11-12, *supra*.

Petitioners argue (at 26) that it would be the "height of irrationality" for Congress to exclude surface runoff from the Act's permit program, while regulating discharges from earthmoving equipment. To the contrary, Congress's decision to focus the Act's permit program on point source discharges, while leaving surface runoff to other mechanisms, lies at the heart of the 1972 Act. It is common, and not irrational, for legislation to take a

stepwise approach to a problem. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

III. THE MATERIAL DISCHARGED BY PETITIONERS CONSTITUTES "POLLUTANTS."

Straying beyond the issues presented by their petition, petitioners argue (at 23-24) that the soil discharged by the earthmoving equipment does not constitute a "pollutant" within the meaning of the Act. To the contrary, the drafters of the 1972 Act recognized that "[s]ediment, often associated with agricultural activities, is by volume **our major pollutant**." 1972 Legis. Hist 1470 (Senate Report) (emphasis added). Indeed, soil contains several items listed in the § 502(6) definition of "pollutant," including "rock," "sand," and "cellar dirt" – as well as "biological materials" in the form of organisms and detritus found underground, and plants growing on the surface. *See also United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000) ("plain dirt" is pollutant).

Moreover, § 502(6) also encompasses "dredged spoil," synonymous with the term "dredged . . . material" used in § 404(a), which in turn has been defined regulatorily as "material that is **excavated** or dredged from waters of the United States." 33 C.F.R. § 323.2(c) (emphasis added). The material that was excavated from the swales and streams on Borden Ranch clearly falls within this description.

In addition to dredged material, § 404(a) also encompasses "fill material," defined regulatorily – at the time of the actions at issue here – as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. § 323.2(e). *See also* 1977 Legis. Hist. 707 (Senate committee where § 404(f) originated emphasized that the adverse effects of § 404 discharges include "the destruction

and degradation of aquatic resources that results from replacing water with dredged material or fill material"). The primary purpose of the activity at issue here was to replace swales and streams with dry land, and change their bottom elevation, so that they could be planted with crops. *See, e.g., Avoyelles*, 715 F.2d at 924-25 (under circumstances analogous to those here, court held that material constituted "fill material" under the above definition).[4]

Petitioners argue (at 24) that soil is not a pollutant because it is not "waste." However, "rock," "sand," "cellar dirt," "biological materials," and "dredged or fill material" are pollutants under the Act – regardless of whether they are being disposed of to discard waste material or for some other purpose. *See, e.g., Minnehaha*, 597 F.2d at 627 ("We . . . find no justification in the Act for the District Court's determination that whether the discharge of a particular substance listed in § 502(6) constitutes the discharge of a 'pollutant' under the Act depends upon the purpose for which the discharge is made.").

[4] The court decision cited by petitioners (at 22) unpersuasively indicates that, where material is deposited in order to replace United States waters or change their bottom elevation, and where that activity is undertaken in order to facilitate a subsequent use (in that case a landfill), it is the subsequent use, not the replacement or changed elevation of waters, that is the "primary purpose." *Resource Investments v. U.S. Army Corps of Engineers*, 151 F.3d 1162, 1168 (9th Cir. 1998). The intentional replacement of United States waters, and the intentional change of their bottom elevation, are virtually always undertaken to facilitate some subsequent use. To define that subsequent use as the "primary purpose" would eliminate or drastically reduce the applicability of the definition.

IV. PETITIONERS "ADDED" POLLUTANTS TO UNITED STATES WATERS.

Noting the Act's definition of discharge as any "addition" of any pollutant to United States waters, § 502(12), petitioners argue (at 21-23) that they "added" no pollutants to the Borden Ranch swales and streams. They are wrong.

A. Petitioners Added Pollutants Drawn From Uplands.

The district court found that petitioners' equipment conveyed earth from **outside** United States waters (*i.e.*, from the upland areas of Borden Ranch) **into** those waters (*i.e.*, into the swales and streams). *See* p. 7, *supra*. Petitioners do not and could not explain how taking pollutants from uplands and placing them into United States waters is not an "addition." *See, e.g., Rybachek v. USEPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (if "the material discharged is coming **not from the streambed itself, but from outside it, this clearly constitutes an 'addition.'**") (emphasis added).

Confronted with this fundamental flaw in their "addition" argument, petitioners change the subject, arguing (at 22) that the material at issue is not "fill material." For reasons already stated, they are wrong. But even if they were correct, the material would still contain "rock," "sand," "cellar dirt," and "biological materials" – and thus would still be a "pollutant" within the meaning of the Act. § 502(6). Section 301(a) bans "the discharge of **any** pollutant" (emphasis added), not just some of them. Thus, regardless of whether a given pollutant constitutes "dredged or fill material" within the meaning of § 404(a), its discharge falls within the § 301(a) prohibition.

B. Petitioners Added Pollutants Drawn From United States Waters.

Petitioners also added pollutants by excavating earth from the swales and streams, and relocating that material to various other places within those features. That relocation constitutes an "addition" under every appellate decision to consider the issue – **including the *National Mining* decision that petitioners characterize (at 22) as "persuasive."** Indeed, *National Mining* expressly concluded that "**plowing** ... may ... produce actual discharges, i.e., **additions** of pollutants." *National Mining*, 145 F.3d at 1405 (emphasis added). *See also United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000); *United States v. M.C.C.*, 772 F.2d 1501 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *"redeposit" analysis reaffirmed*, 848 F.2d 1133 (11th Cir. 1988), *modified on other grounds*, 863 F.2d 802 (11th Cir. 1989); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

This conclusion is compelled by the plain language of the Act, which grants the Corps permit jurisdiction over *inter alia* discharges of "dredged ... material" – *i.e.*, "material that is excavated or dredged **from waters of the United States**." 33 C.F.R. § 323.2(c) (emphasis added). As Senator Ellender observed, in introducing the floor amendment that first proposed assigning dredged material permitting authority to the Corps: "The disposal of dredged material does **not** involve the introduction of **new** pollutants; it merely **moves the material from one location to another**." 1972 Legis. Hist. at 1386 (emphasis added). *Accord*, *id.* 1387 (Sen. Ellender: "**moving** spoil material from **one place in the waterway to another, without** the interjection of **new** pollutants") (emphasis added). Thus, the Fifth Circuit long ago noted that pollutants need not "come from an external source in order to

constitute a discharge," because "'dredged' material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources **would effectively remove the dredge-and-fill provision from the statute**." *Avoyelles*, 715 F.2d at 924 n.43 (emphasis added).

Petitioners apparently believe that the statutory term "addition" must be interpreted more narrowly for agriculture, such that "plowing" can never involve an addition. *See* Pet. Br. 21. But neither § 502(12) nor any other provision of the Act supports that interpretation. To the contrary, § 404(f) expressly indicates that plowing and other normal agricultural activities can involve discharges, and that such discharges are subject to the Act's permit program in specified circumstances. *See* pp. 5-6, 11-12, *supra* (quoting § 404(f)).

Petitioners' reading of "addition" would flout not only the plain meaning of the Act's substantive provisions, but also the Act's central **purpose** of restoring and maintaining the integrity of United States waters. *See* p. 3, *supra* (quoting § 101(a)). The environmental impacts Congress intended § 404 to address include "the destruction and degradation of aquatic resources that results from replacing water with dredged material or fill material," and "the contamination of water resources with dredged or fill material that contains toxic substances." 1977 Legis. Hist. at 707 (Senate Report). Such impacts "are no less harmful when the dredged spoil is redeposited in the same wetland from which it was excavated. The effects on hydrology and the environment are the same." *Deaton*, 209 F.3d at 336.

Petitioners' recourse to the caselaw is equally unavailing. They characterize as "persuasive" the D.C. Circuit's decision in *National Mining*. Pet. Br. 22. However, that decision rests on the untenable notion that "there can be

[no] . . . addition of **dredged material** when there is no addition of **material**." 145 F.3d at 1404 (emphasis in original). As the Fifth Circuit made clear in *Avoyelles*, the discharge of dredged material **inherently** involves material drawn from United States waters. *See* pp. 18-19, *supra*. Likewise, the Fourth Circuit considered but **rejected** *National Mining*'s fundamental rationale: "The idea that there could be an addition of a pollutant **without** an addition of material **seems to us entirely unremarkable**, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here." *Deaton*, 209 F.3d at 335 (emphasis added).

Because *National Mining* could not deny that **some** redeposits are properly subject to regulation, 145 F.3d at 1405, 1407, it sought to distinguish between redeposits based on their size and their distance from the point of excavation. Specifically, it held that the Act's permit requirement does not encompass "incidental fallback," which occurs when "material is removed from the waters of the United States and a **small portion** of it happens to fall back," "**virtually to the spot from which it came**." 145 F.3d at 1404, 1403 (emphasis added). Such tests, however, have no basis in the text or environmental goals of the Act. To the contrary, when soil is excavated, serious harm to United States waters can result, regardless of whether it is relocated horizontally before being redeposited. *See Deaton*, 209 F.3d at 336; *United States v. Wilson*, 133 F.3d 251, 273-74 (4th Cir. 1997) (separate opinion of Payne, J.).

Even assuming the correctness of *National Mining*, that decision fully supports regulation of the discharges at issue here, which are a far cry from the incidental fallback at issue there. First, here the material redeposited into the Borden Ranch swales and streams encompassed not merely a "small portion" of the material excavated, but

virtually all of it. Second, instead of falling back "virtually to the spot from which it came," 145 F.3d at 1403, here "soil was wrenched up, **moved** around, and redeposited **somewhere else**." Pet. Br. 21 (quoting Ninth Circuit opinion) (emphasis added).

Indeed, *National Mining* expressly confirmed that it did not intend to question the regulation of "redeposits at **some distance** from the point of removal." 145 F.3d at 1407 (emphasis added). The amount of relocation the *National Mining* court considered sufficient to trigger § 404 jurisdiction was minimal. *Id.* 1407, 1402 (confirming that the court was not questioning § 404 jurisdiction over "sidecasting," a practice that "involves placing removed soil . . . **by the side of an excavated ditch**") (emphasis added). *Accord*, *Deaton*, 209 F.3d at 333, 335-37 (relocation from a ditch to the sides of the ditch); *M.C.C.*, 772 F.2d at 1505-06 (relocation from navigation channel to adjacent sea grass beds). That minimal relocation test is clearly met here – and indeed, as indicated above, *National Mining* expressly confirmed that **plowing** suffices to constitute an addition. *Id.* 1405.

The other arguments offered by petitioners are equally meritless. First, even if the material excavated by petitioners "never loses contact with the immediately-surrounding ground," Pet. Br. 21, it still was excavated and moved to a different location. Appellate courts have repeatedly applied § 404 to movements of pollutants that never left United States waters. *See, e.g.*, *M.C.C.*, 772 F.2d at 1505-06 (tugboat propellers added dredged material by stirring up sediment that then settled on adjacent sea-grass beds); *United States v. Huebner*, 752 F.2d 1235, 1241-43 (7th Cir. 1985) (§ 404 permit required for farmer's use of earthmoving equipment to spread soil around wetlands); *United States v. Brace*, 41 F.3d 117, 127-29 (3d Cir. 1994) (same).

Indeed, a ruling that no "addition" exists unless dredged material has first been removed from United States waters – rather than relocated within those waters – would open a major loophole in the Act. Excavated material could be piped underwater in rivers and estuaries or pushed along the surface of wetlands, thus damaging or destroying those waters' hydrology and releasing toxic pollutants formerly immobilized in sediment – precisely the loss of aquatic integrity the Act was designed to prevent.

Finally, § 404(a)'s reference to discharge of dredged or fill material "at specified disposal sites" (*see* Pet. Br. 23) offers no support for petitioners' position. First, the *National Mining* concurrence cited by petitioners simply reads that statutory language as "suggest[ing]" "**either** a temporal **or** geographic separation between excavation and disposal." 145 F.3d at 1410 (Silberman, J.) (emphasis added). By joining the panel opinion, Judge Silberman expressed his agreement that the amount of geographic separation required is minimal, and that plowing qualifies as an addition. *See* p. 21, *supra*. Second, even if certain discharges were to be exempted from § 404(a) based on the phrase "specified disposal sites," they would still be subject to § 301(a)'s ban on "the discharge of **any** pollutant by **any** person." (Emphasis added.) Unlike § 404(a), § 301(a) does not contain the phrase "specified disposal sites."

V. PETITIONERS' EARTHMOVING ACTIVITIES, WHICH DESTROYED SOME UNITED STATES WATERS AND DAMAGED OTHERS, DO NOT FALL WITHIN THE ACT'S AGRICULTURAL EXEMPTIONS.

Because petitioners' earthmoving activities constitute discharges, they are prohibited by § 301(a), and thus

cannot proceed without a § 404 permit. Petitioners' attempt to avoid this result by invoking the § 404(f) exemptions must be rejected.

Section 404(f) includes a conditional exemption for enumerated activities, combined with a "recapture" provision confirming that "[a]ny discharge of dredged or fill material into the navigable waters incidental to **any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced**, shall be required to have a permit under this section." § 404(f)(2) (emphasis added).

"Read together, the two parts of Section 404(f) provide a narrow exemption for agricultural activities that have **little or no adverse effect** on the waters of the United States." *Brace*, 41 F.3d at 124 (emphasis added) (citing *Avoyelles*). The committee where § 404(f) originated emphasized that wetlands, bays, estuaries and deltas "are the Nation's most biologically active areas," and that "the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage." 1977 Legis. Hist. 644. Accordingly, the committee drafted § 404(f), not to provide a blank check for agricultural wetlands destruction, but on the contrary to impose "a **degree of discipline** over the extent to which these activities destroy wetlands or pollute navigable waters." *Id.* (emphasis added). In short, the exemption encompasses "those narrowly defined activities that cause **little or no adverse effects either individually or cumulatively**." *See* p. 6, *supra* (quoting legislative history) (emphasis added).

Consistent with all previous appellate decisions, the Ninth Circuit properly rejected petitioners' attempt to use

these exemptions to destroy various United States waters, and seriously damage others.

A. Draining and Destroying United States Waters Does Not Constitute "Plowing" Within the Meaning of § 404(f)(1).

Petitioners argue that their discharges fall within the § 404(f)(1)(A) exemption for "plowing." This argument is triply flawed.

First, the use of bulldozers equipped with four- to seven- foot-long tines and other attachments to break apart the subsurface clay pan of ranchland swales and streams and to fill those features in – thus destroying their aquatic characteristics – does not constitute "plowing." As the Corps' regulations confirm, plowing "does **not** include the redistribution of soil, rock, sand, or other surficial materials in a manner which **changes any area of the waters of the United States to dry land**. For example, the redistribution of surface materials by blading, grading, or other means to **fill in wetland areas** is not plowing." 33 C.F.R. § 323.4(a)(1)(iii)(D) (emphasis added).

Second, even if petitioners' activities could be considered plowing, § 404(f)(1)(A) does not encompass **all** plowing, but only plowing that constitutes "normal" agricultural activity. Thus, to fall within § 404(f)(1)(A), the activities "must be part of an established (i.e., on-going) farming, silviculture, or ranching operation." 33 C.F.R. § 323.4(a)(1)(ii). By contrast, "[a]ctivities which bring an area into farming, silviculture, or ranching use are not part of an established operation." *Id.* Indeed, even on previously farmed areas, the exemption is unavailable when the area "has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations." *Id. See also*

Brace, 41 F.3d at 126. Here, hydrological modifications **were** necessary to bring the swales and streams into the farming use.

Third, § 404(f)(1)(A)'s use of the term "plowing" must be read in the context of that same paragraph's reference to "**minor** drainage." (Emphasis added.) "The exemption for minor drainage does **not** apply to the drainage of swampland or other wetlands." 1977 Legis. Hist. 709 (Senate Report) (emphasis added). *Accord*, 33 C.F.R. § 323.4(a)(1)(iii)(C)(2) (minor drainage "does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland"). Having completely converted some wetlands to dry land, and partly converted others, *see* pp. 7-8, *supra*, petitioners have gone well beyond what would qualify as "minor drainage." *See* Pet. App. 8 (Ninth Circuit: "by ripping up the bottom layer of soil, the water that was trapped can now **drain** out") (emphasis added). By using § 404(f)(1)(A) to authorize **major** drainage under the guise of "plowing," petitioners' untenable reading would defeat Congress's careful choice of the word "minor."

B. The Change from Ranched Wetlands to Farmed Uplands Is a Change in Use Triggering the § 404(f)(2) Requirement for a Permit.

Even if petitioners' discharges fit within § 404(f)(1), they still require a permit under § 404(f)(2). Petitioners do not and could not deny that their activities – which destroyed some swales and streams and seriously damaged others – caused the "flow or circulation" of United States waters to be "impaired," and "the reach of such waters" to be "reduced." § 404(f)(2). Instead, petitioners argue that their discharges were not "incidental to any activity

having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject." *Id.* This argument is untenable.

As the Ninth Circuit held here, "[c]onverting ranch land to orchards and vineyards . . . clearly" satisfies the changed use prong of § 404(f)(2). Pet. App. 10. This conclusion tracks the wording of § 404(f)(1)(A), which lists "farming" separately from "ranching," thus recognizing that they do **not** constitute a single use.

Moreover, here petitioners have not simply changed from a ranching use to a farming use – they have changed from a **wetland** ranching use to an **upland** farming use – and have done so by **destroying** waters of the United States. To exempt unpermitted drainage of United States waters, of a severity sufficient to convert those waters to uplands, would override Congress's express intent to exempt only "minor" drainage, § 404(f)(1)(A) – **not** "the drainage of swampland or other wetlands." *See* pp. 5-6, *supra* (quoting Senate Report). Moreover, by opening the door to wholesale conversions among various § 404(f)(1)(A) uses (*e.g.*, from forested wetlands to upland row crops), such an approach would fundamentally contravene Congress's intent that the § 404(f) exemptions encompass only "those narrowly defined activities that cause little or no adverse effects either individually or cumulatively," *see* p. 6, *supra* (quoting legislative history), as well as the Act's core purpose of restoring and maintaining the integrity of United States waters. § 101(a).

Thus, the Corps has properly provided that "[a] **conversion of a section 404 wetland to a non-wetland** is a change in use of an area of waters of the United States." 33 C.F.R. § 323.4(c) (emphasis added). *See also* Br. of American Forest & Paper Assn. at 6, 16-17 (**agreeing** with this interpretation, under which the

§ 404(f) exemption encompasses only activities that are "fully compatible with long-term operations that **maintain** the wetland's status and function," but not the "abuse of the exemption to **destroy** wetlands") (emphasis added). Petitioners do not and could not dispute that they effected such a conversion.

Petitioners themselves concede (at 33) that activities "done for the primary purpose of draining and drying out significant water bodies to convert them to uplands capable of being farmed" are not exempt. Here petitioners' activities included dragging four- to seven-foot long metal tines behind a bulldozer to rip the wetland soil in order to dry it out and convert the swales and streams to orchards and vineyards. This deep ripping was necessary to render the soil suitable for orchards or vineyards or, in other words, "capable of being farmed" for the new use of orchards and vineyards. Thus, petitioners' own characterization of § 404(f) would preclude exemption of their deep ripping activities.[5]

VI. PROTECTION OF WATERS THAT UNDISPUTEDLY CONSTITUTE "WATERS OF THE UNITED STATES" POSES NO FEDERALISM ISSUES.

Contrary to the suggestions of petitioners and *amici*, *see*, *e.g.*, Pet. Br. 45-46, application of the Act's permitting

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[5] Petitioners attempt to avoid this result through the untenable claim that the swales and streams were previously "subject" to cropping use within the meaning of § 404(f)(2), even if they had not been "subjected" to that use. *See* Pet. Br. 34. The argument simply ducks the fundamental point: the new use could not occur until petitioners had **first** destroyed United States waters by draining and filling them.

requirements as written poses no federalism issues. The observations of this Court in *SWANCC* concerning the federalism implications of regulating waters that do **not** qualify as "waters of the United States" under § 502(7) in no way support petitioners' and *amici*'s attempts to inject federalism concerns into the present case, which addresses only waters that concededly **do** qualify. Preventing damage or destruction of United States waters – including the swales and streams at issue here as well as the rivers, lakes, perennial streams, and estuaries threatened by petitioners' and *amici*'s sweeping arguments – is a proper focus of the federal government's regulatory power.

Indeed, invocation of federalism principles here would reduce them to a caricature. Surely the applicability of constitutionally driven clear statement canons cannot turn on such minutiae as whether excavated earth loses contact with the ground before being redeposited (Pet. Br. 21) or whether discharges are accomplished using a backhoe or bulldozer (*id.* 26). In either case, waters of the United States – in whose protection there is a legitimate federal interest – are destroyed or damaged.

Nor can the applicability of clear statement canons hinge on whether petitioners believe the activity at issue to be "traditional." *See* Pet. Br. 46. Aside from the obvious implausibility of positing a "tradition" of using modern, mechanized technologies unknown a hundred years ago (in this case, bulldozing wetlands with four- to seven-foot metal prongs), our environmental statutes would be eviscerated if "traditional" activities were insulated from regulation. After all, piping untreated sewage and industrial effluent into rivers was "traditional" before passage of the Act, but petitioners presumably would not argue that

federalism concerns are implicated by regulating those practices.[6]

"Traditional" or not, control of agricultural point source discharges is essential to preserving the integrity of United States waters. During the two decades prior to 1977, the annual rate of wetland loss in the conterminous United States was 458,000 acres – nearly all of it agricultural. 1983 Wetlands Trends Report at 3, 26. Without control of agricultural point source discharges, the rate of wetland loss could not have been reduced so dramatically in recent decades. *See* 2000 Wetland Trends Report at 9, 46 (from 1986 to 1997, the annual rate of wetland loss in the conterminous United States dropped to 58,000 acres, of which agriculture still accounts for 26%). Impacts on United States waters – whether from individually large projects, or from a collection of smaller ones – is a proper focus of federal regulatory authority. *See, e.g., United States v. Lopez*, 514 U.S. 549, 558 (1995) ("where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence") (citation and emphasis omitted).

In short, where the waters at issue are undisputedly United States waters, federalism concerns require no

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[6] Equally if not more far-fetched, *amici* representing proponents of mining, roadbuilding, and other infrastructure projects seek to invoke federalism-driven clear statement canons based on the allegedly "routine" nature of those projects. Br. of Natl. Stone, Sand & Gravel Assn., *et al.*, at 16-19. *Amici* themselves describe these projects as "large scale," *id.* 12, and make no effort to deny their devastating impacts on United States waters. There is no basis for asserting that such projects qualify any less as "water pollution issues of national importance" (*id.* 17) than discharges from, say, a small town's sewage treatment plant, or a small factory.

narrowing interpretation of the Act – and in any event the plain meaning of the Act precludes any such narrowing. *See, e.g., Whitman v. American Trucking Assns.*, 531 U.S. 457, 471 (2001).

CONCLUSION

Petitioners' sweeping arguments threaten to produce major damage and destruction of wetlands, rivers, streams, lakes, and estuaries around the Nation – not just by agriculture, but by (*inter alia*) mining, channelization, commercial and residential development, and roadbuilding. Those arguments, so inimical to the Act's core purposes, are refuted by the plain meaning of its substantive provisions. Compliance with the permit system enacted by Congress is an essential tool for preventing this devastating environmental damage, and will not harm the legitimate interests of industry. *See, e.g., Huebner*, 752 F.2d at 1245-46 ("[W]e decline to be persuaded by [the farmers'] highly speculative prophecies of doom. . . . [P]roper compliance with the permit process is all that is required under the Clean Water Act to ensure that the use of the nation's wetlands proceeds with care."). The judgment below should be affirmed.

DATED: October 25, 2002.

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In The Supreme Court of the United States

BORDEN RANCH PARTNERSHIP, ANGELO K. PSAKOPOULOS,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF DR. JOY ZEDLER, DR. GENE LIKENS, DR. RONALD JONES, DR. REBECCA SHARITZ, DR. JOSEPH LARSON, DR. BARBARA BEDFORD, DR. JUDITH MEYER, DR. LEIGH FREDRICKSON, DR. ORIE LOUCKS, DR. RAYMOND SEMLITSCH, DR. CHRISTOPHER WOLTEMADE, DR. JOHN CALLAWAY, DR. KLAUS RICHTER, DR. STUART FINDLAY, DR. FREDERICK SHORT AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Pursuant to Supreme Court Rule 37, fifteen scientists file this brief with the consent of the parties as amici curiae in support of Respondent, the United States.[1]

Amici are scientists with broad expertise in America's aquatic ecosystems. They include leading authors on wetlands, hydrology, and aquatic systems, and they have together won many distinguished awards, including the National Medal of Science. Many amici have chaired or served on panels of the National Academy of Sciences established to advise Congress or federal agencies on issues related to wetlands. As discussed below, many amici filed extensive scientific comments in a recent rulemaking related to the issues in this case, which the federal agencies found to present highly relevant and credible evidence. An appendix with a brief biography of each scientist is attached.

SUMMARY OF ARGUMENT

The central question in this case is whether Congress intended to regulate the conversion of wetlands to uplands for use in crop production. According to the District Court, Borden Ranch Partnership accomplished this conversion through the use of mechanized equipment that both drained the swales at issue, and filled them "partially" or "fully." Petitioners equate their activities with normal plowing, and contend that they should not be regulated any more than the normal, ongoing plowing that occurs in many wetlands without draining them. As a matter of science, this argument ignores how drastically deep-ripping differs from normal plowing, principally because it can transform and eliminate wetlands.

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than amici curiae or their counsel, made a monetary contribution to the preparation or submission of the brief.

Section 404(f)(2) requires regulation of discharges "incidental" to "*any*" activities that change the use and reduce the reach of waters. The legislative history of this section indicates that Congress intended to regulate the drainage of wetlands for other uses. There is therefore an obvious distinction between the deep ripping and filling of the swales at issue in this case and normal plowing.

Petitioners claim that any change to cropland from a wetland used for rangeland or forestry should not be considered a change in use. However, this interpretation would exempt from the Clean Water Act the majority of the wetland conversion in the United States, including 80% of the wetland conversion that occurred in the twenty years prior to the adoption of Section 404(f).[2] This conversion has been a major source of pollution and of degradation of rivers, wetlands and bays in the United States, including the Everglades, the Gulf of Mexico and the Missouri River.

The fact that the swales at issue in this case were previously grazed does not distinguish these wetlands from nearly 8 million acres of wetlands used as rangelands that retain most or all of their valuable wetland functions. According to USDA, there are also 61 million acres of forested wetlands. Petitioners' interpretation of Sec. 404(f) attempts to define cropping, ranching and silviculture as one use. Under Petitioners' interpretation, Section 404(f) would allow the great majority of the roughly 100 million acres of wetlands in the United States to be converted to uplands for crop use without any regulatory review. It is not possible to reconcile Petitioners' views with Congress's goals to subject the "drainage" of wetlands to review.

Petitioners here excavated soil from five to seven feet below the wetland and mounded it and pushed it into furrows

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[2] Office of Technology Assessment, Wetlands: Their Use and Regulation 87, 92 (1984) (using data from U.S. Fish & Wildlife Service Status and Trends analysis).

two feet high. *Borden Ranch v. U.S. Army Corps of Engineers*, Lexis 21389 at 2 (E.D. Cal. 1999). As the Court of Appeals for the Fourth Circuit recognized in *United States v. Deaton*, the excavation of soils beneath a wetland and their redeposit on the surface "adds" and therefore discharges the statutorily identified pollutant, dredge spoil, which was not present when the material existed only in a more benign form buried under the wetland. 33 U.S.C. Sec. 1362(12). The *Deaton* court recognized that soils, sediments and attached pollutants a few feet below the surface of a wetland or other water body are far less bioavailable and therefore less able to cause harm than those same sediments and pollutants when brought up and spread along the surface. When sediments are deeply buried, it is appropriate to question whether they are part of the water body at all.

The potential harm from these additions of dredge material does not turn on whether the material brought to the surface moves horizontally only a few feet. Neither does a small volume of sediment mean insignificant pollutants have been added since pollutants of concern, such as toxics embedded in the sediment, can cause pollution in microscopic amounts. There is no significant distinction between the soil relocations at issue in this case and those in the many other lower court cases that Petitioners acknowledge involve discharges.

Furthermore, in Section 404(f)(2) Congress required the regulation of discharges that were merely "incidental" to "any" activity that converts wetlands and streams to upland uses. This suggests that Congress wished to reach broadly to cover essentially any movements of sediment associated with the conversion of wetlands. That counsels against Petitioners' efforts to dismiss as too small the soil relocations at issue in this case. They were sufficient to fill and convert the wetland and therefore were the exact type of activity Congress sought to regulate through Section 404(f)(2).

ARGUMENT

I. Congress's intent to regulate the conversion of wetlands to uplands would have little significance if conversions to cropland were not included.

A. *Statutory Background*

A brief summary of the language and legislative history of Section 404(f) is necessary to appreciate the relevance of the scientific information presented here.

Section 404(f)(2), 33 U.S.C. Sec. 1344(f)(2), requires a permit for discharges "incidental" to "any activity" that are designed to "change" the "use" and "reduce the reach" of regulated waters. Since wetlands can be waters of the United States, this language on its face applies to activities that change the use and "reduce the reach" of wetlands by filling or draining them and thereby eliminating them or reducing their extent as waters of the United States. This concern about the drainage of wetlands is also reflected by Section 404(f)(1), which exempts only "minor" drainage, not major drainage. The desire to regulate drainage is also implied by Section 404(f)(1)(c), which exempts both the "construction" and "maintenance' of irrigation ditches, but exempts only the "maintenance" not the new construction of "drainage ditches" that effects new drainage.

The legislative history of Section 404(f) articulates this intent to regulate fill and dredging activities that convert wetlands to uplands through drainage. The report of the Senate Committee, which crafted 404(f), stated: "The exemption for minor drainage does not apply to the drainage of swampland or other wetlands." S. Rep. 95-370, 76, *reprinted in* 1977 U.S.C.C.A.N. 4326, 4401 (emphasis supplied). In discussing Section 404(f)(2), the report also stated, "[P]ermit review is necessary for placement of fill to

convert a hardwood swamp to another use through construction of dikes or drainage channels." *Id.* at 4402. On the floor, Senator Muskie, the principal author of the amendments, explained, "Permits are required . . . where ditches or channels are dredged in a swamp, marsh, bog, or other truly aquatic area." See 123 Cong. Rec. S26767 (daily ed. Aug. 4, 1977).[3] Indeed, the requirement to regulate conversion was part of an overall goal to exempt only those activities that would have "'little or no adverse affect'" on the nation's waters. *Avoyelles Sportsmens League, Inc. v. Marsh*, 715 F.2d 897, 926 (5th Cir. 1983) (quoting floor statement of Senator Muskie).

The District Court found that the activities by Borden Ranch converted wetlands used for grazing into uplands for the purpose of planting a vineyard both by filling and draining them. E.R. 1011-12.[4] Petitioners argue, however, that converting grazing land to cropland is not a change in use and so is not subject to Section 404(f)(2). Petitioners argue, in fact, that "normal farming, silviculture and ranching" should all be treated as the same use because they are all listed in Section 404(f)(1) (even though Congress considered them to be different enough to list them separately.) This interpretation would allow conversion of both grazed and timbered wetlands to uplands used for crops

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[3] Even those who favored broader legal changes agreed that at least large-scale drainage of wetlands should be regulated. Senator Dole stated: "I agree that the construction of major canals and waterways designed to modify significantly or to drain an entire swamp or marshland should not fall within the category of 'minor drainage.'" 123 Cong. Rec. S26767 (daily ed. Aug. 4, 1977).

[4] Petitioners repeatedly assert that the land was capable of being "farmed" even before this conversion. The legal significance of this capability is not clear, but in any event, the District Court specifically found that Petitioners deliberately deep-ripped the land to drain it for the purpose of being able to plant vineyards and orchards that could not otherwise be planted on the land because it was too wet. ER-1011-12.

without regulatory review. Science relevant to these discussions is presented below.

B. Significance of conversion of grazed or forested wetlands to cropland

By the 1980's, the contiguous Unitted States had lost more than half of the estimated 221 million acres of wetlands that existed in the 1780's and had only slightly more than 100 million acres left.[5] The "vast majjority" of this loss resulted from conversion to croplands. *Ild.* at 9. In the two decades preceding Congress's enactment of Section 404(f) in 1977, rates of loss were averaging 550,000 acres per year, and eighty percent of this loss resulted from conversion to croplands.[6] Moreover, much of this conversion was concentrated in the southeast, where bottomland hardwood swamps (the wetlands specifically identified in the Senate report for Section 404(f)) were being rapidly converted to soybean fields as described in *Avoyelles*.[7]

Petitioners contend that there is no change in use because the wetland swales at issue were already grazed. But grassed wetlands have been used extensively for grazing by farmers since at least the Middle Ages. Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 Stanford Envt'l L.J. 247, 279 (1996) (discussing common use of grazing lands in English wetlands).

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5 T.E. Dahl, Wetland Losses in the United States, 1780's to 1980's. (U.S. Department of the Interior 1990).

6 OTA, *supra* note 2, at 87, 92; W.E. Frayer, T.J. Monahan, D.C. Bowden, & F.A. Graybill, Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States, 1950's to 1790's (1983).

7 See OTA, *supra* note 2, at 108; Dahl, *suprra* note 5, at 9 (mapping conversion of wetlands to cropland). To understand that the wetland conversion at issue in Avoyelles was for the creation of a soybean field, see the District Court opinion at 511 F. Supp. 2783, 287 (W.D. La. 1981).

Throughout the United States, in fact, both wetland and upland grasslands were grazed naturally by bison, deer and other ungulates, and therefore are compatible with at least some grazing. (See discussion infra at 15-16). USDA estimates that these kinds of rangelands occupy 578 million acres, roughly 30% of the contiguous United States,[8] and wetlands used as rangeland occupy an estimated 7.8 million acres.[9] Under Petitioners' theory, all these wetlands could be converted to uplands for cropping purposes without any regulatory review.

Moreover, more than half of the remaining wetlands in the United States are forested (roughly 61 million acres according to USDA),[10] and nearly all of these wetlands have been subject to periodic silvicultural use through at least timber harvest.[11] Wetlands subject to extensive forestry

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8 Economic Research Service, Agricultural Resources and Environmental Indicators 1:1-3 (2000).

9 Ralph E. Heimlich, Keith D. Wiebe, Roger Claassen, Dwight Gadsby, Robert M. House, Wetlands and Agriculture: Private Interests and Public Benefits 22 (USDA, Economic Research Service 1998).

10 Heimlich, et al., *supra* note 9, at 22. (Sometimes figures of roughly 50 million acres are used by the Fish & Wildlife Service, separating forested wetlands from shrub wetlands.)

11 The fact that forested wetlands have been harvested for timber is simply a reflection of the fact that nearly all the country's forests have been periodically subject to timber harvest and other silvicultural activities. See David Wilcove, The Condor's Shadow: The Loss and Recovery of Wildlife in America 18 (1999) ("So thorough were the settlers and timber companies that, over the course of about two centuries, almost every acre of virgin forest from Maine south to Florida and west to the Great Plains fell to the ax or saw."). *See also* Reed Noss, Edward T. Laroe III, J. Michael Scott, Endangered Ecosystems of the United States: A Preliminary Assessment of Loss and Degradation, National Biological Survey Biological Report 28, 37 (1995) (95-98% loss of virgin forests in contiguous U.S. by 1990); Reed F. Noss & Robert L. Peters, A Status Report on America's Vanishing Habitat and Wildlife 68 (1995) (southern forested wetlands have been "extensively logged");

include the category of "bottomland hardwood swamps" identified in the Senate Report as lands whose conversion to other uses would be regulated. These wetlands too, under Petitioners' theory, would be subject to conversion to uplands for cropping purposes without any regulatory review.

The potential for conversion under Petitioners' theory is not merely theoretical. In 1998, the Economic Research Service of the U.S. Department of Agriculture estimated that if legal restrictions were dissolved, farmers would likely convert another 5.8 to 13.2 million acres of wetlands purely for farming purposes. Interestingly, ERS also estimated that overall farm income would decline since the increased production would depress farm prices.[12]

Of course, once wetlands are converted to upland crops, the lands are no longer waters of the United States under the Clean Water Act. They can then be converted to roads, buildings or other developed uses without a permit. If Petitioners' theory were accepted, therefore, wetlands would likely be extensively converted to upland crops as a temporary step toward developing them.

For Petitioners' interpretation of Section 404(f) to be correct, Congress in 1977 must have wished to ignore the vast majority of conversions from wetlands to uplands occurring at the time and throughout American history. And if Petitioners' interpretation were correct, even conversion of wetlands to developed uses could easily circumvent any regulatory review. Petitioners' interpretation of 404(f) is inconsistent with Congress's intent to regulate wetland conversion.

Mitsch & Gosselink, *supra*, at 56 (Great Dismal Swamp in Virginia and North Carolina subject to extensive forestry).

[12] Heimlich et al, *supra* note 9, at 31-38.

C. *Environmental affects of wetland conversion to cropland*

The significance of wetlands to the chemical, physical and biological integrity of the nation's water bodies is difficult to overestimate. They filter pollutants that could otherwise clog, poison or over-fertilize deeper portions of rivers and bays. They transform these pollutants into plant materials and small animals that form the base of much of the aquatic food chain. They provide the spawning or rearing grounds for large numbers of fish species, and the principal foraging grounds for the waterfowl, wading birds and raptors that rely on aquatic ecosystems.[13]

Drainage of wetlands for cropping purposes eliminates or degrades all wetland functions. Numerous studies have documented the increase in water pollution that occurs in streams in agricultural areas when wetlands are drained and converted to cropland.[14] As these studies reveal, this kind of

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[13] See generally, Office of Technology Assessment, Wetlands: Their Use and Regulation 43-61 (1984) (summarizing wetland functions). See also discussion and citations below.

[14] See generally, Christopher Woltemade, *Ability of Restored Wetlands to Reduce Nitrogen and Phosphorus Concentrations in Agricultural Drainage Water*, J. Soil & Water Cons. 303-309, 303 (2000) (citing numerous studies showing elevated concentrations of pollutants in agricultural drainage water). For example, in one study comparing two similar streams, one of which had been straightened into a drainage ditch and experienced great wetland drainage, the other of which retained its wetlands, the U.S. Geological Survey documented downstream sediments loads 32 times greater and nitrogen loads 23 times greater in the channelized system, and also documented more rapid flood flows and stream erosion. H. Cochrane & S.D. Williams, *Nutrient & Sediment Loads in a Channelized Stream and a Nonchannelized Wetland Stream in the Beaver Creek Watershed, West Tennessee, in* Instream Investigations in the Beaver Creek Watershed in West Tennessee 1991 through 1995, USGS Water Resources Investigations Report 96-4186 (1996). See also R.K. Neely & J.L. Baker, J.R. Jones, V.P. Borofka & R.W. Bachman, *Factors Affecting Nutrient Loads in Some Iowa Streams*, 10 Water Res.

drainage also increases soil erosion along the stream banks, bringing a new source of sediment downstream. See generally 40 C.F.R. Sec. 230.41.

In describing her home ranch, Justice O'Connor colorfully depicts the erosive effect of channelizing flow on agricultural landscapes.

> "In an effort to keep floodwater away from the railroad tracks, the railroad company built levees and diversions to channel the water [of Railroad Draw] out from the rail bed. In time these efforts led to massive erosion, cutting a channel in the draw as deep as fourteen feet in places. Where formerly the rainwater had spread out over wide areas of the draw and produced thick grass in the rainy seasons, after the levee and diversion work, gullies formed, which in turn developed into steep defined canyons."

Sandra Day O'Connor and H. Alan Day, Lazy B: Growing Up on a Cattle Ranch in the American Southwest 260 (2002). Although this channelization was not undertaken for agricultural purposes, and the passage does not clearly defines the characteristics of "Railroad Draw," the results precisely reflect the consequences that often occur when wetlands are drained to produce crops.

The ecological significance of this conversion can be illustrated by a few examples.

Of the historic Everglades, roughly the northern quarter have been drained through a complicated system of ditches and pumps to form the Everglades Agricultural Area, predominantly used for sugarcane. Ongoing drainage of this

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117-121, 120-21 (1976) (watersheds with fewer wetlands and more drainage have increased nutrient loads in streams).

cropland dramatically alters the flow of water into the Everglades, pouring in too much water during rainy seasons and wet years and too little water during dry seasons and dry years. These changes have greatly contributed to major ecological declines, including pollution that has transformed major chunks of the historic "river of grass" to dense stands of cattail, major declines in fish populations and the loss of 90% of the historic populations of wading birds. Reversing the hydrologic effects is a major focus of the $7.8 billion Everglades restoration plan authorized by Congress in 2000.[15]

The corn belt states of Ohio, Indiana, Illinois, Iowa and Missouri have lost at least 85% of their wetlands (25 million acres total), almost all to agricultural conversion.[16] Similarly, the lower Mississippi Valley has lost three quarters of its 21 million acres of forested wetlands, primarily to cropland conversion.[17] This drainage of wetlands for cropland has allowed excess "nutrients" to flow to the Gulf of Mexico creating a large "dead zone." Nitrogen fertilizer running off cropland is no longer filtered by wetlands, and the nitrogen creates explosions of algae. When they die, the bacteria that eat them suck the oxygen out of the water that is

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15 Good explanations of this Everglades problem can be found in South Florida Water Management District, Everglades Interim Report (1998) (a peer reviewed publication that describes both the major water quality problems and hydrologic changes that have affected the Everglades); U.S. Army Corps of Engineers, Central and Southern Florida Project Comprehensive Review Study, Final Integrated Feasibility Report and Programmatic Environmental Impact Statement (April 1999). For discussions of the declines in fish and wading bird populations see pages 3-1, 3-2, 3-9 and 3-11.

16 See Dahl, *supra* note 5, at 6, 9 (listing losses by state and mapping extent of drainage for agriculture).

17 William. J. Mitsch & James G. Gosselink, Wetlands 49 (1993). Heimlich et al, *supra* note 9, at 20 (attributing losses primarily to cropland conversion).

needed for fin and shellfish, leaving an area the size of Massachusetts devoid of aquatic life.[18] In order to make up for the historic loss of wetlands, scientists working for the federal government to design a solution have identified the need to restore millions of acres of wetlands.[19]

Levee and drainage activities along the lower Missouri River have contributed to the extensive loss of wetlands, and other shallow habitats such as oxbow lakes and mudflats, as the habitats were converted to cropland. These wetlands and related habitats originally provided critical spawning and rearing grounds for the river's fish, and they produced much of the insects and plant material that supported the river's food web. In part to protect this new cropland that would otherwise flood each year, dams on the upper river are managed to control the natural rise and fall of the river. According to a recent report of the National Academy of Sciences, "Of the 67 native river fish living along the mainstem [of the river], 51 are now listed as rare, uncommon, and/or declining . . . ."[20]

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18 See generally, U.S. National Science and Technology Council, Committee on Environment and National Resources, Integrated Assessment, Hypoxia in the Northern Gulf of Mexico (2000).

19 See William Mitsch, John Day, Jr., Wendell Gilliam, Peter M. Groffman, Donald E. Hey, Gyles W. Randall & Naiming Wang, *Reducing Nitrogen Loading to the Gulf of Mexico from the Mississippi River Basin: Strategies to Counter a Persistent Ecological Problem*, 51 Bioscience 373-88 (2001). "Because of extensive artificial drainage over the past 200 years, many of the once-ubiquitous freshwater wetlands and riparian zones associated with the streams and rivers of the basin no longer exist. Gone with them is their capacity to mitigate water pollution." *Id.* at 376.

20 National Research Council of the National Academy of Science, The Missouri River Ecosystem: Exploring the Prospects for Recovery 3 (2002). In addition to the National Research Council report, for a good summary of the changes to the Missouri River and its impacts, see D.L. Galat, J.W. Robinson, and L.W. Hesse, *Restoring Aquatic Resources to the Lower Missouri River: Issues and Initiatives*, in Overview of the

The uncontrolled conversion of wetlands to uplands used for crops is inconsistent with Congress's intent to exempt only activities with "little or no adverse effects" on the nation's waters, *Avoyelles*, 715 F.2d at 926.

D. Cropping and grazing have different environment affects and are treated as different uses by federal agricultural policies.

Cropping and grazing should be treated as different uses, among other reasons, because they have dramatically different environmental and economic consequences and as a result have been treated differently by the U.S. Department of Agriculture and federal agricultural policy. For example, USDA conducts a private land census on a periodic basis, and in doing so, distinguishes five major land uses: cropland, grassland pasture and range, forestland, urban uses, special uses and miscellaneous. Within the contiguous United States, grassland pasture and range is the largest use at 589 million acres and exceeds cropland at 460 million acres and forestland at 559 million acres.[21]

River-Floodplain Ecology in the Upper Mississippi River Basin (D.L. Galat & A.G. Frzer eds.) (1994); U.S. Fish & Wildlife Service, Missouri River Biological Opinion 116 (2000) (describing habitat losses and their significance). Another good summary of the Missouri River changes stated as follows: "The Missouri River's natural riparian ecosystem has been nearly eliminated and presently consists of a discontinuous, single row of trees. Missouri River floodplain forest coverage decreased from 76 percent in 1826 to 13 percent in 1972, while cultivated lands increased from 18 percent to 83 per cent. . . . Population densities of fish species of chubs, and two species of minnows have been reduced by as much as 95 percent since 1971." Interagency Foodplain Management Review Committee, Sharing the Challenge: Floodplain Management Into the 21st Century 56-57 (1994).

21 Economic Research Service, Agricultural Resources and Environmental Indicators 1:1-3 (2000), page 1:1. See also National Resources Conservation Service, Summary Report, 1997 National

Reflecting the different environmental effects of ranching and cropping, agricultural conservation programs seek to limit the conversion of rangeland to crops but do not restrict grazing. For example, both the Sodbuster and Swampbuster provisions of the Food Security Act of 1985 deny certain farm subsidies to farmers who convert potentially erodible grasslands or wetlands to cropland, but there are no consequences for grazing such lands.[22] The Conservation Reserve Program pays farmers to reconvert cropland to grasslands or forests to control soil erosion, and improve water quality and wildlife habitat, but the law allows controlled grazing of such lands. 16 U.S.C. Sec. 1232(1)(7), as amended by Section 2101 of the Farm Security and Rural Investment Act of 2002, P.L. 107-171, 161 Stat. 134 (2002). And a new Grassland Reserve Program pays farmers not to convert grasslands to croplands, but allows grazing to continue. Section 2401, P.L. 107-171 (2002).

These policies reflect Congressional awareness of the environmental consequences of converting grazed lands, including grazed wetlands, to croplands. The policies reflect the significant environmental distinctions between growing crops and ranching.

First, a wetland grazed under natural conditions maintains its basic water quality and flow-slowing

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Resources Inventory 18-24 (Revised 2001) (separating cropland from range and pasture land).

22 16 U.S.C. Sec. 3801(a)(1)A) (defining agricultural commodity, the production of which can lead to the loss of crop benefits, only as an "agricultural commodity planted and produced in a State by annual tilling of the soil").

functions.[23] Water quality filtration, for example, occurs through the contact between water and the plants and the wetland soil.[24] The conversion to an upland crop will greatly reduce or eliminate functions like water quality filtration, particularly of long swales that provide a long distance for water to interact with the soils.

Second, cropping typically involves the regular turnover of soil, leaving it exposed to water and wind erosion.[25] Soil erosion on cropland is one of the largest water quality problems in the United States. [26] There can be some erosion on rangeland, but it is typically minimal by comparison because the grasses and their roots hold the soil in place. The

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23 Paul R. Adamus, A Process for Regional Assessment of Wetland Risk, ch. 4.5 (1992) (reviewing literature regarding impacts of grazing on northern prairie wetland functions and finding no effects on runoff volume, timing and groundwater recharge, only limited effect on capacity to retain sediment and phosphorus and possibly enhanced breakdown of nitrogen).

24 See Mitsch & Gosselink, *supra* note 17, at 139-58 (discussing transformation of pollutants in wetland soils).

25 It is poss le to plant some crops without complete annual tillage, but such no-till cropping was used by only 15% of cropland in the U.S. in 1997, and 63% of farmers have yet to adopt any form of conservation tillage, which includes leaving residue on the crop fields to limit erosion. Merritt Padgitt, Doris Newton, Renata Penn, Carmen Sandretto, Production Practices for Major Crops in U.S. Agriculture, 1990-97, 67 (Economic Research Service 2000).

26 Natural Resources Conservation Service, A Geography of Hope 40 (1996) (hereinafter "Geography of Hope") ("One of the major sources of water quality impairment from agriculture is the sediment . . . that enters streams as a result of soil erosion.") A national map of estimated sediment delivered to rivers and streams from soil erosion shows heavy delivery in intensively cropped regions and little delivery from areas dominated by rangeland. *Id.* at 41. In general, state reports to the EPA list agricultural runoff as the most prevalent source of water quality problems. U.S. EPA, Office of Water, The Quality of Our Nation's Waters 64, 87, 107 (2000).

vineyards at issue here would not be replanted every year, but vintners typically keep soil uncovered between the plants.

Third, cropland typically involves heavy inputs of fertilizer and pesticides, while such uses on rangeland are far smaller or non-existent.[27] The runoff of these chemicals creates significant water quality problems.

Finally, rangeland typically maintains far greater habitat values for the grassland species that used them.[28] Indeed, some grazing is critical for many species that depend on grazing lands. The conversion of grasslands to crops is considered a major cause of concern for much wildlife.[29]

All human uses of the land can have some adverse environmental effects, and excessive or inappropriate grazing can do so as well. However, science bears out Justice O'Connor's statement that "good grazing practices could be good for the land." O'Connor & Day, supra, at 262-63.

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27 Geography of Hope at 43, 46 (maps of national potential runoff of nitrogen, phosphate and pesticides show high cropping areas as areas of concern and rangelands as of little concern). While more than 600 million pounds of active pesticide ingredients were applied to corn, wheat, soybeans, cotton, vegetables, potatoes and fruit, so few pesticides are applied to rangeland that USDA does not survey uses on rangeland. See Economic Research Service, *supra* note 21, chapter 4.3

28 As one summary states: "A convincing argument can be made that grazing is necessary for a healthy grassland ecosystem. Light to moderate grazing stimulates grass growth, disturbs the seedbed, and returns nutrients to the soil through excreta. In fact the variety of life in the great grasslands of North America was shaped in large part by grazing." D.S. Licht, Ecology & Economics of the Great Plains 67 (1997).

29 "In recent decades, many farmers have converted their hayfields and pasturelands to the more profitable row crops, a change that has decimated populations of some [grassland] birds." Wilcove, *supra* note 11, at 98 (summarizing grassland bird declines).

Treating the conversion from a grazed wetland to an upland crop as a change in use is consistent with common usage, sound science and obvious environmental differences.

E. Section 404(f) has robust affects without Petitioner's expansive reading.

Applying Section 404(f) to regulate conversion of wetlands to uplands used for crops does not deprive the "normal farming" exemption in 404(f)(1) of major significance. Of the remaining wetlands in the United States, roughly 10.5 million acres are estimated to be so-called "cropped wetlands" by the U.S. Department of Agriculture.[30] These are wetlands that remain inundated in the late winter or spring, but in which the water runs off early enough to allow farmers to plow and grow crops at least in some years. Some of these wetlands have been subject to some drainage but not enough to eliminate wetland conditions; others are not drained at all. The functions of these wetlands are degraded, but they can still be valuable in many cases. Depending on

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30 Heimlich et al at 22; *see also* National Research Council, National Academy of Sciences, Wetlands: Characteristics and Boundaries 158 (1995) (10 million acres of farmed wetlands). For identifying which cropped wetlands are still flooded enough to be considered wetlands, the EPA and Corps of Engineers use the same standards used by the U.S. Department of Agriculture. *See* U.S. Soil Conservation Service, U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, U.S. Fish & Wildlife Service, Memorandum of Agreement Concerning Wetlands Determinations for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act (1994) (stating that "agricultural lands" which are defined not to include rangelands, shall be identified using USDA standards). USDA's standards are set forth at 7 C.F.R. Section 12.31 and 12.32(a)(3) and provide that a wetland is not considered fully converted, even if converted for cropping, if "surface water is present for extended periods especially early in the growing season even though it may be absent by the end of the season in most years."

the circumstances, they can still store and hold floodwaters, filter sediments and other pollutants, provide spawning areas for fish, and feeding grounds for water birds.[31]

Section 404(f) guaranties that farmers can, without a permit, continue to plow, maintain drainage systems and engage in any other normal activity used to grow crops. They may similarly switch to other crops. Section 404(f) similarly guaranties that foresters can continue to build roads and harvest timber without a permit. Section 404(f) therefore has significant effects without Petitioners' overly expansive reading.

II. Relocations of sediments and soils dredged from beneath the surface in wetlands, streams and bays add and therefore discharge pollutants.

Borden Ranch Partnership's activities in this case involved dredging materials from five to seven feet down from the bottom of the wetland, and pushing it in a manner that in some cases "mounded" the material and in other cases created raised rows at least two feet high. District Court Opinion, E.R.1028-30. The District Court found that these soil movements "filled" drainages hundreds of feet long either "partially" or "fully," ER 1028-30, and that pollutants moved "horizontally and vertically." E.R. 1012. Petitioners characterize their activities as simply "turn[ing] soil in place," Brief of Petitioners at 18, but this description ignores the environmental significance of the relocation, which

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31 National Research Council, *supra* note 30, at 160-61 (stating that "[a]gricultural wetlands" although reduced in function "are generally found in an extensively altered landscape where they can be particularly important for controlling water quality, preventing floods, and maintaining biodiversity" and describing particular values in filtering agricultrural runoff).

exposed soil immediately at or near the surface that previously had only been buried several feet.

Petitioners claim that these movements do not make an "addition" of "any pollutant" to the water body and therefore cannot constitute "discharges" under Section 502(12). Petitioners do not appear to dispute the many lower court cases that have found pushing soil around in a wetland to be discharges. Brief of Petitioners at 26-27. Close inspection of these cases reveals that they address activities hard to distinguish from this case, ranging from cutting vegetation and pushing it into wetlands to the construction of drainage ditches by pushing material to the side of the ditch. Petitioners' wish to distinguish the soil-moving activities at issue in this case in part on the theory that anything that can be described as plowing cannot be a discharge, and in part on a theory that the relocations are somehow too minor to add pollutants. Both distinctions are unfounded.

A. *Chemical and biological significance of this relocation.*

In *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit explained well why even relatively small-scale excavation and relocation of materials from beneath the surface of a wetland or stream adds pollutants: It may not add material, but it adds a pollutant, "dredge material" that did not exist when materials were present only in a more benign form:

> "Contrary to what the Deatons suggest, the statute does not prohibit the addition of material; it prohibits 'the addition of any pollutant.' The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable. . . . It is of no consequence that what is

> now dredged spoil was previoussly present on the same property in the less threatening form of dirt and vegetation in an undisturbed state."'

209 F.3d at 335.

Moreover, the Deaton court did a good job of explaining the scientific basis for concern with material dredged from wetlands, particularly when associated with drainage.

> "Wetlands perform a vital role in maintaining water quality by trapping sediment and toxic and nontoxic pollutants before they reach streams, rivers, or other open bodies of water. See Office of Technology Assessment, U.S. Congress, Wetlands: Their Use and Regulation 48-50 (1984). Given sufficient time, many (but not all) of these pollutants will decompose, degrade, or be absorbed by wetland vegetation. See *id.* at 48-49. When a wetland is dredged, however, and the dredged spoil is redeposited in the water or wetland, pollutants that had been trapped may be suddenly released. See *id.* at 49 ("Natural or man-made alterations of the wetland caused by lowering the water table, dredging, and the like, could mobilize large quantities of toxic materials."); *id.* at 124 ("A long-term effect of the disposal of contaminated dredged spoil in or near wetlands is the potential bioavailability of toxic chemicals such as oil and grease, pesticides, arsenic, and heavy metals, when the sediments are resuspended periodically."). At the same time, the increased drainage brought about by the dredging may render the surrounding wetland unable to reabsorb and filter those pollutants and sediment (the very purpose of dredging is to destroy wetland characteristics). See 400 C.F.R. § 230.41(b) (explaining how discharge of dredged or fill material

> in wetlands "can degrade water quality . . . by interfering with the filtration function of wetlands . . . "). Even in a pristine wetland or body of water, the discharge of dredged spoil, rock, sand, and biological materials threatens to increase the amount of suspended sediment, harming aquatic life. See *id.*; Office of Technology Assessment, supra, at 48."

209 F.3d at 336 (some citations deleted, elipsis added).

The basic scientific fact recognized by the court in *Deaton* is that sediments and their associated pollutants buried even a few feet beneath the surface of a bay, river or wetland are far less biologically available than those same sediments and pollutants when spread across the surface. In a recent rule-making on the activities that cause discharges, many of the amici scientists submitted comments identifying dozens of scientific references that show the significance of this change.[32] These comments were extensively summarized in the preamble to the final report and found to be credible by the EPA and the Army Corps of Engineers. Environmental Protection Agency, Department of Defense, "Further Revisions to the Clean Water Act Regulatory Definition of 'Discharge of Dredge Material,'" 66 Fed. Reg. 4550, 4563-64 (July 13, 2001). The discussion below is largely drawn from these comments.

The upper foot or even smaller portion of a wetland or stream or river bottom is of great ecological significance.[33]

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[32] Letter to Mike Smith & John Lishman from Dr. Joy Zedler et al. (October 16, 2000).

[33] See generally Josephine Y. Aller, Sarah A. Woodin, and Robert Allert (eds.), Organism –Sediment Interactions: Proceedings of the 1998 Organism-Sediment Interactions Symposium (1998) (discussing importance of upper sediment layer for biochemical interactions between sediments and water column and use by marine animals). As the leading textbook on wetlands states, "Wetland soil is both the medium in which

Large numbers of aquatic organisms from worms to shellfish live in this surface layer, in which many fish also lay their eggs. The sediment characteristics required for these organisms may be precise. (As one well known example, salmon eggs require gravel beds.) A major concern with the redeposit of dredge material is that when new sediments replace the old, they may bury these organisms, or they may no longer be compatible with the needs of the organisms.[34]

Increased loads of chemical pollutants attached to the sediment below the wetland are also a concern because bottom dwelling organisms tend to absorb chemicals, such as metals, and may pass them up the food chain to fish and ultimately humans in increasingly concentrated form.[35] And redeposited material and its chemical pollutants are also typically left in less compact form than normal wetland soils or sediments, and therefore are more easily swept up into the water column or down a stream or drainage ditch where they may cause other harm. Studies have repeatedly found

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many of the wetland chemical transformations take place and the primary storage of available chemicals for most wetland plants." William. J. Mitsch & James G. Gosselink, Wetlands 115 (1993). In general, the particular characteristics of wetland soils, particularly those in the upper foot, determine the ways in which they take up, transform the form of and release nutrients, including phosphorus and nitrogen, with significant effects on adjacent and downstream waters. *Id.* at 139-42,152-58.

34 The scientist submittal discusses numerous studies finding impacts of sediment from dredge material on mussel populations. It also discusses the sensitivity of salmon and trout species to sedimentation of their nests, called "redds."

35 One study that followed the chain of toxicity effects up the food chain following disturbance of sediments, in that case by a major flood, is J.P. Ludwig, *Caspian Tern Reproduction in Saginaw Bay Ecosystem Following a 100-year Flood Event*, 19 J. Great Lakes Research 96-108 (1993).

increased levels of runoff of suspended sediment during and after excavation of drainage projects.[36]

In addition, there tends to be continuous interchange between the chemical constituents in the water column and those either attached to the sediments in the upper layer or in the water between the sediments.[37] These are active areas, for example, in which pollutants may be transformed, removed or released into the water column.[38] Changes in the composition of soil and sediment by the redeposit of material can alter these important interactions.

As the *Deaton* court explained, wetland soil movements associated with drainage activity cause particular concerns because the drainage reverses many of the chemical processes that allow wetlands to bind up or break-down

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36 T.A. Ivari, *Effect of Choptank Watershed Drainage Project on Suspended Sediment Concentration, in* Proceedings of the 1991 National Conference Sponsored by the Irrigation and Drainage Division of the American Society of Civil Engineers and the Hawaii Section 223-230, 230 (1991); C.E. Simmons and S.A. Watkins, The Effects of Channel Excavation on Water Quality Characteristics of the Black River and Ground-water Levels Near Dunn North Carolina, US. Geological Survey Water Resources Investigations (1982).

37 For this reason, studies of the Everglades pollution problem described below include careful analysis of the factors that affect how soil and water concentrations of phosphorus affect each other. See Jose A. Amador, G. Hafiza Richany and Ronald D. Jones, *Factors Affecting Phosphate Update by Peat Soils of the Florida Everglades*, 153 Soil Science 46370 (1992); Jose A. Amador & Ronald D. Jones, *Nutrient Limitations on Microbial Respiration in Peat Soils with Different Total Phosphorus Content*, 25 Soil Biol. Biochem. 793 801 (1993).

38 In mined streams and lakes below them, studies in New Zealand, Australia have shown both increased turbidity, that blocks light to bottom dwelling plants, and heavy toxic releases from the mined sediments. P.A. Ryan, *Environmental Effects of Sediment on New Zealand Streams: A Review*, 25 New Zealand J. Marine and Freshwater Research 207-221 (1991).

pollutants. Wetlands have this capacity in part because their top soil layer tends to lose its oxygen (become anaerobic) when flooded or saturated, and biochemical interactions in the absence of oxygen include the binding of many toxic materials and the breakdown and release of nitrate into harmless forms. The drainage restores the oxygen to the soils and leads to the release of pollutants, including both toxic metals and nutrients.[39]

The potential impacts are significant. According to the Environmental Protection Agency "[a]pproximately 10% of the sediment underlying U.S. surface waters is sufficiently contaminated with toxic materials to pose potential risks to fish and to humans and wildlife that eat fish."[40] Reflecting these kinds of risks, the Senate Report to the Clean Water Act amendments of 1977 explains that one of the goals of the permit program was to control "the contamination of water resources with dredged or fill material that contains toxic substances." S. Rept. No. 95-370 at 74, *reprinted in* 1977 U.S.C.C.A.N. at 4399.

The Everglades provides an acute illustration of how dredging activities that drain wetlands can lead to water

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39 See R.P. Gambrell, *Trace and Toxic Metals in Wetlands, A Review* 23 J. Env'l Qual. 883-91 (1994)(summarizing studies showing the release of toxics when canals are constructed through wetlands and the removed material is placed to the side of the constructed channel as spoil); John W. Portnoy, *Salt Marsh Diking and Restoration: Biogeochemical Implications of Altered Wetland Hydrology*, 24 Env'l Management 111-20 (1999) (experimental study showing that rewatering of diked and drained salt marshes can release large concentrations of nutrients); W. Peterson, E. Wiler & C. Williamowski, *Remobilization of Trace Elements from Polluted Anoxic Sediments After Resuspension in Oxic Water*, 99 Water, Air and Soil Pollution 515-22 (1997) (discussing release of toxics from newly exposed sediments).

40 U.S. Environmental Protection Agency, Summary Fact Sheet: Contaminated Sediment, EPA's Report to Congress 2 (January 1998).

quality problems. Phosphorus running off sugarcane fields through drainage ditches carved out of wetlands is transforming the historic "river of grass" into dense stands of cattail with limited oxygen and limited aquatic life.[41] Most of this phosphorus is believed to originate in phosphorus once bound and long stored in those wetland soils but released because of the effects of drainage.[42] The plan being implemented to fix this problem has an estimated cost to agriculture and taxpayers of roughly $700 million. Yet, this phosphorus, like many pollutants, causes problems in miniscule amounts, measured in parts per billion. The fact that significant water pollution can often be based on such miniscule 'additions" makes it particularly inappropriate for this Court to require any kind of "volume" or distance test before an addition of a pollutant can be treated as an addition.

B. Congress's desire to regulate even "incidental" discharges associated with the drainage of wetlands counsels against a limitation of regulation to large soil movements.

Petitioners ask this Court to distinguish the activities in this case from what it views as the more "major" relocations of wetland soils at issue in many other lower court cases. (Brief of Petitioners at 26-27 & n. 17). But apart from the fact that significant pollution can occur in tiny concentrations and Borden Ranch's activities were "major" enough to "fill"

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41 Doren, R.F., T.V. Armentano, L.D. Whiteaker and R.D. Jones, *Marsh Vegetation Patterns and Soil Phosphorus Gradients in the Everglades Ecosystem*, 56 Aquat. Bot.145-163 (1997).

42 U.S. Army Corps of Engineers, Florida's Everglades Program Everglades Construction Project Environmental Impact Statement 2-3 (1995) (drainage of wetland soils in agricultural area leads to the formation of soluble phosphorus that drains into network of canals and pumping facilities and is pumped into Everglades); *id.* at 3-49 (estimated cost of clean-up project is $674 million).

multiple swales 700, 800 and 1000 feet long, ER 1028-29, any distinction based, in essence, on the magnitude of the addition of dredge material would be inconsistent with Section 404(f)(2).

Section 404(f)(2) requires that even "incidental" discharges be regulated if they are associated with "any" activity that changes the use and reduces the reach of waters, including wetlands. The term "incidental" means "subordinate, nonessential, or attendant in position or significance as a: occurring merely by chance or without intention or calculation, [or]. b: being likely to ensue as a chance or minor consequences . . . ." Webster's Third New International Dictionary (unabridged) (1981). The choice of the term "incidental" means that a discharge need be neither intentional nor large.

Section 404(f)(2) also does not require that the ecological affect of the discharge be big enough to cause harm: The language Congress selected focuses on whether the broader activity, to which the discharge is "incidental," reduces the reach or impairs the flow of a regulated wetland or other water body. As previously discussed, Congress was aware that this is achieved typically through drainage, which can be achieved in a variety of ways, including deep-ripping for some wetlands. This focus too indicates that an addition of a pollutant during drainage of swamps should not be disregarded even if the addition itself were minor.

Finally, Section 404(f)(2) applies to a discharge incidental to "any" activity that involves a change in land use and alteration of wetland hydrology. Because Petitioners believe that Congress intended to exempt all agricultural activities, they believe that drainage accomplished through activities that look like plowing cannot be recaptured. But the fact that Section 404(f)(2) applies to "any" activity with

the requisite effects -- whether plowing like or even plowing itself – contradicts Petitioners' argument.

To be sure, normal plowing does not have the effect of draining wetlands and so will not be recaptured. But as the District Court found, deep ripping does.

Petitioners rely heavily on *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) ("NMA"),which held that the agencies could not regulate something the court referred to as "incidental fallback." The court believed such fallback occurs when materials fall back to the "same spot" as a result of a specific technique for constructing drainage ditches used by some developers. *Id.* at 1401. NMA is not applicable because the relocations at issue in this case are far more extensive than the "incidental fallback" described in NMA. However, the analysis here does support the view that NMA was wrongly decided. For reasons discussed above, the excavation of a drainage ditch in a wetland will almost certainly involve an addition of sediment and associated pollutants previously buried under the wetland, and many of these pollutants are likely to eventually move down the drainage ditch. Moreover, the "incidental" nature of the discharge did not appear to matter to Congress, which wanted to regulate discharges "incidental" to activities that drain wetlands. While this Court need not reach the merits of NMA in this decision, that decision was not based on a sound scientific understanding of how pollutants are added during excavation activities in wetlands.

C. Congress did not exclude "plowing" from the definition of a discharge.

Much of Petitioners brief seems premised on the assumption that Congress exempted "plowing" in all cases from the definition of the term "discharge," so the claim that

their activities can be analogized to plowing should dispose of the case. This contention has no textual support. Instead of amending the word "discharge" in 1977, Congress only decided to exempt "plowing" conditionally from a permit requirement if not recaptured under Section 404(f)(2). If any activity that could be analogized to plowing could never be a discharge, there was no reason to exempt it and no reason to subject the exemption to recapture. The common sense implication is that even plowing can be a discharge in some cases. And by choosing the approach it did, Congress was able to draw the line between exempt plowing and regulated activities at the point at which soil relocation converts wetlands.[43]

D. The broad definition of "pollution" supports a broad reading of the term discharge.

It seems reasonable that the determination of whether an activity "adds" a pollutant should be influenced by whether it is deemed likely or capable of causing "pollution." 33 U.S.C. Sec. 1362(19). The Clean Water Act defines "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." As this Court explained in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 ((1985), "'the word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems is [are] maintained.'" (quoting House Report; ellipsis and insertions in original). For the reasons discussed above, activities that

[43] See also *Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617, 626 (8th Cir. 1979): "[I]t is obvious that an exemption . . . would be necessary only if such work is generally subject to Sec. 404 permitting requirements." *See generally Ratzlaf v. U.S.*, 510 U.S. 140 (1994) ("judges should hesitate so to treat statutory terms" as "words of no consequences,"), *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (It is a "cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word.").

relocate material from beneath the surface of a wetland to the surface, and activities that convert wetlands, do not preserve this integrity of aquatic ecosystems.

CONCLUSION

For the foregoing reasons, Petitioners' activities were properly regulated under the Clean Water Act.

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Appendix A – Brief Biographies of Amici

Dr. Joy Zedler is Aldo Leopold Chair of Restoration Ecology at the University of Wisconsin and a former member of the National Academy of Science's Water Science and Technology Board. She recently chaired a panel of the National Academy of Sciences National Research council studying wetland mitigation and previously served on panels that analyzed wetland identification and classification and restoration of aquatic ecosystems.

Dr. Gene Likens is President and Director of the Institute for Ecosystem Studies, Vice President of the New York Botanical Garden, Director of the Mary Flagler Arboretum and Professor of Biology at Yale University. A member of the National Academy of Sciences and Past President of the Ecological Society of America, he has been awarded nine honorary degrees from Universities around the world among numerous international professional awards. His more than 400 articles and 14 books explore a wide range of ecological fields with a particular emphasis on biogeochemistry. This year, Dr. Likens also won the National Medal of Science, the nation's highest science award.

Dr. Ronald Jones is Professor of Biology and Director of the Southeast Environmental Research Program at Florida International University. A specialist in the biochemistry of wetland soils, he has published more than 40 peer-reviewed articles, many related to the impact of phosphorus on the Everglades and its relationship to soil interactions. Dr. Jones has been the lead researcher on separate projects related to the protection and restoration of the Everglades funded by Everglades National Park, the U.S. Army Corps of Engineers, the Environmental Protection Agency and the South Florida Water Management District.

Dr. Orie Loucks is Ohio Eminent Scholar in Applied Ecosystem Studies and Professor of Zoology at Miami University of Ohio. The author of more than 200 scientific publications, he served ten years on the National Academy of Science's Board on Water Science and Technology and also on the Science Advisory Board of the International Joint Commission, and the Board of Governors of The Nature Conservancy. He is an elected Fellow of the Ohio Academy of Sciences and the American Association for the Advancement of Science, and was given the Distinguished Service Award of the American Institute for Biological Sciences in 1994.

Dr. Rebecca R. Sharitz is a Professor of Botany at the University of Georgia and a Senior Research Ecologist at the Savannah River Ecology Laboratory, where she previously served as director. She has served as Secretary General of the International Association of Ecology and on the National Academy of Science Committee for the Restoration Aquatic Ecosystem and Restoration of the Greater Everglades System.

Dr. Raymond Semlitsch is professor of Biology at the University of Missouri. One of this country's leading experts on amphibians, he has published more than 100 articles, including many of the leading papers on the use of isolated wetlands by amphibians.

Dr. Leigh H. Fredrickson is Rucker Professor of Fisheries and Wildlife at the University of Missouri and Director of the Gaylord Memorial Laboratory. He has published more than 100 articles, primarily on waterfowl, water birds and wetlands.

Dr. Barbara Bedford is Senior Research Associate in the Department of Natural Resources at Cornell University, and former director of the Ecosystems Research Center of

Excellence. She has published many articles on the interactions between wetland plant communities, hydrology and nutrient loading, and has been a member of a peer review panel established to advise the Florida agencies on the clean-up of the Everglades.

Dr. Judith Meyer is a Research Professor at the Institute of Ecology and the University of Georgia and is Co-Director of the River Basin Science and Policy Center at the University of Georgia. She has served as the president of the Ecological Society of America. She has published numerous journal articles on the influence of watershed land uses on river structure and function and riparian zones as sinks for agricultural inputs.

Dr. Joseph Larson, Professor Emeritus of the University of Massachusetts, developed the first models for functional assessment of freshwater wetlands and for predicting wildlife species habitat in New England freshwater wetlands. He has been a U.S. delegate to the meetings of the contracting nations under the Ramsar treaty on wetlands of international importance. He was awarded the national Chevron Conservation Award for his work on wetlands and was the founding Executive Chairman of the National Wetlands Technical Council.

Dr. John Callaway is an Assistant Professor in the Department of Environmental Science at the University of San Francisco and served as Associate Director of the Pacific Estuarine Research Laboratory at San Diego State University. He has published many articles regarding the restoration of wetland soils and plants and their sediment dynamics.

Dr. Christopher Woltemade is an Associate Professor of Geography at Pennsylvania State University at

Shippensburg. A hydrogeomorphologist, his published work has examined watershed influences on flood flows, wetland capability to improve water quality, and the relationship between river management and wetland quality.

Dr. Klaus O. Richter is the Senior Wetland Ecologist in King County's Department of Natural Resources in Washington State. For the past 15 years Dr. Richter has specialized in freshwater wetland science, management, protection and regulation. A recipient of the 1996 National Wetlands Award in Science Research sponsored by the Environmental Law Institute and EPA, Klaus has authored numerous scientific papers on the monitoring, distribution, and decline of amphibians, particularly near Puget Sound.

Dr. Stuart Findlay is a Scientist at the Institute for Ecosystem Studies in Millbrook, New York and holds a Ph.D. in Zoology from the University of Georgia. He has published numerous journal articles on the effects of human activities of tidal march vegetation, including nutrient retention other wetland functions.

Dr. Frederick Short is Professor in the Department of Natural Resources at the Jackson Estuarine Laboratory at the University of New Hampshire. He has published journal articles and taught courses on the habitat values and functions of estuarine and coastal sea grass, wetland restoration and mitigation.